87-2083

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE MOZART COMPANY, a corporation,

Petitioner,

VS.

MERCEDES-BENZ OF NORTH AMERICA, INC., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*MOSES LASKY
LASKY, HAAS, COHLER & MUNTER
505 Sansome Street, 12th Floor
San Francisco, CA 94111-3183
(415) 788-2700
Attorneys for Petitioner

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864 2300

QUESTIONS PRESENTED

By "defense of business justification" in questions 1, 2 and 3 below is meant a defense that some interest of the tying party legalizes what would otherwise be an antitrust violation which the jury found was an unreasonable restraint under the Rule of Reason.

1. Is any defense of "business justification" countenanced at all to a claim of a tying violation of Section 3 of the Clayton Act?

2. Is any defense of "business justification" countenanced to a claim of tying violation of Section 1 of the Sherman Act—unless possibly that the tying vendor cannot state specifications of the tied product? In this case it was conceded that it could and did.

3. With respect to a claim of violation of Section 2 of the Sherman Act by an attempt to monopolize

   (a) Is any defense of "business justification" countenanced at all?

   (b) Is inference from predatory conduct the only way to show "specific intent"? Is there any reason why specific intent cannot be shown by direct evidence of the intent?

4. Where all the elements necessary to collateral estoppel (issue preclusion) are established, can the preclusion be defeated by claiming that more or different evidence is available at the later trial?

5. Are not tying arrangements still of antitrust concern, and is not the "leverage theory" of tying as stated in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9 Cir. 1984), to which this Court denied certiorari, 473 U.S. 908, still valid law, particularly when the fact-finders have found unreasonableness under the Rule of Reason and not merely a *per se* violation?

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Petitioner The Mozart Company[1] prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the Ninth Circuit in *The Mozart Company v. Mercedes-Benz of North America, Inc.*, Nos. 86-1733 and 86-2156 in that court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 833 F.2d 1342 (1987) and is set out as Appendix A (p. A-1 below). An opinion of the district court at an earlier stage appears in 593 F.Supp. 1506 (N.D.Cal. 1984) and is set out in Appendix B (p. A-20).

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment was made and entered on December 9, 1987. A timely petition for rehearing was filed on December 21, 1987, and was denied on February 26, 1988 (Appendix C, p. A-50). Time to file this petition for certiorari was extended through June 27, 1988, by order of Justice O'Connor on April 28, 1988 (Appendix D, p. A-51).

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291; the district court had jurisdiction under 15 U.S.C. § 15 and 28 U.S.C. § 1337(a)

STATUTES INVOLVED

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, as amended, Sections 3 and 4, 15 U.S.C. §§ 14 and 15, and Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, Sections 1 and 2, as amended, 15 U.S.C. §§ 1 and 2.

The text of the statutes is set forth in Appendix F, at A-54.

Emphasis in all quotations in this petition has been added unless otherwise noted.

[1]All of Petitioner's stock stands in the name of Cayhaven Corporate Services, Limited, Grant J.R. Stein and David G. Bird as nominees of Mozart Development Company, of which John Mozart is the sole stockholder.

STATEMENT OF THE CASE

In 1941 the Federal Trade Commission issued a cease and desist order, holding unlawful under Section 3 of the Clayton Act a requirement in automobile dealer agreements compelling the dealer to buy its replacement parts from the manufacturer of the automobile. *In the matter of General Motors Corporation, and General Motors Sales Corporation*, 34 F.T.C. 58 (1941). That requirement had theretofore been commonly imposed by American automobile manufacturers on their dealers. American manufacturers thereupon discontinued the practice, and a healthy competition in replacement parts from independent distributors then arose.

In 1965 respondent, Mercedes-Benz of North America (hereafter "MBNA"), began distribution in the United States of the famous Mercedes-Benz automobile, manufactured in Germany by its parent, Daimler-Benz A.G. ("DBAG"). MBNA set up a system of over 400 automobile dealers. The sole means by which one may buy Mercedes cars for resale is by becoming a party to a standard written "Dealer Agreement" with MBNA. That agreement imposed on the dealers a tying clause in the most stringent form requiring purchase of replacement parts from MBNA and prohibiting purchase from anyone else. MBNA first considered adopting the *less restrictive alternative* of allowing purchase of parts from others if equivalent in quality and design to parts obtainable from MBNA or expressly approved by it or DBAG. But it rejected that provision in favor of the absolute requirement, and it set up no procedures by which anyone could seek or obtain approval of parts supplied by others. By 1979 MBNA was selling over $93 million of replacement parts in this country. Despite the fact that it charged 40% to 60% more than independent dealers for the same parts, its dealers purchased from it, as the Dealer Agreement required. Thereby they either suffered loss of profit or else foisted the higher prices onto the consumer.[2]

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[2] The opinion below refers to MBNA's Dealer Agreement as a "franchise", although not so labeled, but this case does not concern the kind of "franchising" that has grown up of recent years, nor does it involve questions about "packaged" sales. What this case involves is the

In 1971 John Mozart established Eurasian Automotive Products, Inc., an independent business of distributing replacement parts for foreign automobiles. Eurasian came to be recognized as the second largest, fastest growing, and most successful of the independent distributors of replacement parts for imported automobiles in the United States. Except for sales of parts to Mercedes dealers, its annual sales increased by nearly $20 million. Phenomenally successful in the other aspects of its business, its sales to Mercedes dealers remained low and flat.

In 1981, following suit by the United States against the same defendant in 1979, petitioner, as Eurasian's assignee, filed this antitrust suit in the district court in San Francisco, claiming violation by respondent of Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. The time period involved is 1975-1979. (For convenience, petitioner and Eurasian are hereafter referred to as Mozart.)

In 1984 this Court decided *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2 (1984) (hereafter "Hyde"). The Court had repeatedly condemned tying arrangements as serving "hardly any purpose beyond the suppression of competition", e.g., *Standard Oil Co. v. United States,* 337 U.S. 293, 305 (1949); *Northern P.R. Co. v. United States,* 356 U.S. 1, 6 (1958), stating that they "fare harshly under the laws forbidding restraints of trade", *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594, 606 (1953). That condemnation of tying arrangements came to be assailed by a group of economists and legal academicians (often called the "Chicago School of Antitrust"[3]), which contended that tying should not be deemed an antitrust violation at all. A leading example is Professor (later Judge) Robert Bork, *The Antitrust Paradox,* Ch. 19 (Basic Books, Inc., 1978). In *Hyde* this Court rejected the assault, made clear that tying arrangements are still a matter of antitrust concern, and reaffirmed and clarified its law about when a tying arrangement is illegal *per se.*

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straight forward old-fashioned situation where the purchase of a desired product is conditioned on purchase of another.

[3] It is so denominated in H.R. Rep. No. 421, 100th Cong., 1st Sess., at 11 (1987), a report on H.R. 585.

It also called attention to the fact *that, even when not illegal per se, a tie may be unlawful under Sherman Act, § 1, under the Rule of Reason.*

Also in 1984, the Ninth Circuit in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, held that it is not necessary to a tying violation for the vendor to have a monopoly or even a dominant position throughout the market of the kind of product in which the tying product falls, and that it is sufficient that some buyers find the seller's product so uniquely attractive that they succumb to a tie. It held that a tying arrangement is illegal *per se* if the seller of the tying product has the capacity to force some buyers to purchase a tied product they do not want or would have preferred to purchase elsewhere; all that is required is *leverage*, "some special ability" to force a purchaser to do something that he would not do in a competitive market. This, it held, could be found in possession of anything that makes the tying product sufficiently unique, and the economic power to compel a tie may have its source in a distinctive trademark when the tying product is "available only from defendant" and is "sufficiently attractive to some customers to enable defendant to require those who wished to obtain it also to buy [another product] from defendant" (e.g. p. 1345, 1346).

Data General petitioned this Court for certiorari, and this Court allowed MBNA, the present respondent, to file an *amicus* brief in support of the petition. *Data General Corporation, petitioner v. Digidyne Corporation, et al.*, 469 U.S. 1155. MBNA's *amicus* brief then stressed that a reversal of *Digidyne* was important to *its defense of the present case.*

In 1985 this Court denied certiorari in *Digidyne*, 473 U.S. 908. Also in 1985 this case went to trial. The bulk of the evidence in an *eleven* week trial was on the issue whether MBNA had "economic power". The case was put to the jury on the law as stated in *Hyde* and in *Digidyne.*

The jury was instructed to return a *special* verdict on whether the tie was an unreasonable restraint of trade *per se*, and it answered that it was.

It was *also* instructed to return a special verdict on whether the tie was an illegal restraint under the *Rule of Reason*, i.e., did it

restrain trade and was it anticompetitive? To use the phrasing of *Business Electronics Corp. v. Sharp Electronics Corp.*, ____ U.S. ____, 99 L.Ed.2d 808, 108 S.Ct. 1515 (May 2, 1988), the "factfinder [was to weigh] all of the circumstances of a case in deciding whether a restrictive practice . . . imposed an unreasonable restraint on competition". Or to use the words of *Hyde, supra* (466 U.S. at 29), "after inquiry into the actual effect" on competition, the jury was to determine whether the arrangement did unreasonably restrain it. *The jury answered "yes"* to that question; the tie *did* restrain trade, and it *was* unreasonable, not only *per se* but *also* on weighing the evidence *under Rule of Reason.*[4] This verdict followed after all parties had introduced evidence on relevant market, competitive effects, and all else that enters into reasonableness.

One would have supposed that with these two special verdicts the case would proceed to a jury determination of fact and amount of damages. *Instead, the trial court directed verdicts for MBNA on the Clayton, § 3, claim and the Sherman, § 2 claim.* Mozart moved for judgment, notwithstanding the verdict, of liability on the tying claim in accordance with a prior motion for a directed verdict made at the close of evidence. This was denied, and the Court entered judgment for MBNA on all the claims. It did so because of a third special verdict, requested by the court in the event either of the first two special verdicts found violations. To the question "Do you find that there was a business justification for the conduct which you have found violated Section 1?" the jury answered "yes". Justification was claimed by MBNA as protection of its good will.

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[4] The special verdicts read:

"1. Do you find that the defendant violated Section 1 of the Sherman Act by way of a tying arrangement which was unlawful under the *per se* test?

"Yes."

"2. Do you find that defendant violated Section 1 of the Sherman Act by way of a tying arrangement which was unlawful under the Rule of Reason test?

"Yes."

Appendix E hereto, A-52, is a copy of the special verdicts.

By appropriate motions and objections Mozart submitted that (1) there can *never* be a business justification to a Clayton Act, § 3, case, (2) that there can *never* be a business justification to an attempt-to-monopolize violation of Sherman Act, § 2, and (3) that as respects a tying violation under Sherman Act, § 1, the *only* justification, *if any*, countenanced by law would be that the maker of the tying product could not reasonably state specifications of the tied product sufficient to permit others to manufacture it, and it was conceded that specification was possible and was done.

On the appeal MBNA no longer contended, as it had in the trial court, that it lacked the "economic power" necessary to make the tie unlawful. It did *not* contend that the instructions on that issue were improper. It rested its case purely on "business justification". It did not contend that, absent justification, it had not violated the law. The issue of economic power was argued neither in the briefs nor orally.

Nevertheless, in affirming the judgment, the court below disagreed with the Ninth Circuit's prior decision in *Digidyne*. In essence it rejected the view that tying is an antitrust offense, and it held that the trial court's instructions, based on *Digidyne* which this Court had left undisturbed, were "flawed". It repudiated the "leverage theory" outright (A-6, fn. 3).

The Metrix Case

Before this action was filed, an identical action against MBNA, claiming a tie unlawful under Sherman Act, § 1, had been commenced by Metrix Warehouse, Inc., another independent distributor of replacement parts, in the United States District Court for the District of Maryland, *Metrix Warehouse, Inc. v. Daimler-Benz and Mercedes-Benz of North America, Ltd., et al.* The issue was the same as here, the lawfulness of MBNA's compulsion that its automobile dealers buy replacement parts from MBNA, and MBNA there advanced the same claim of "business justification". The *Metrix* case was tried first, and the jury in *Metrix rejected the claim of "business justification"* and returned a verdict for Metrix. The district judge in that case upheld that verdict of illegality on motion but granted a new trial on the amount of damages. Upon the basis of the *Metrix* decision, Mozart moved that liability and, particularly, the issue of justifi-

cation were settled by collateral estoppel or issue preclusion under the principles laid down in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The district court here denied the motion on the reasoning that the *Metrix* decision lacked finality. But, while the present case was being subsequently tried, the district court in Maryland certified *Metrix* for an interlocutory appeal under 28 U.S.C. § 1292(b), and, while the present case was under submission in the Ninth Circuit, the Fourth Circuit affirmed, *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft and Mercedes-Benz of North America*, 828 F.2d 1033 (1987).

The Ninth Circuit then held that the Maryland decision *was final* for purposes of collateral estoppel (A-10), but it nevertheless refused to apply collateral estoppel on the basis that the evidence in the two cases was different (A-11).

MBNA then petitioned this Court for certiorari to the Fourth Circuit in the *Metrix* case. On May 16, 1988, this Court denied the petition. (*Mercedes-Benz of North America v. Metrix Warehouse, Inc.*, No. 87-1560, ____ U.S. ____, 56 U.S.L.W. 3790.

Thus, what is an unlawful tie in the Fourth Circuit is a lawful tie in the Ninth Circuit with respect to the same vendor, the same product, the same tie, and the same justification.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the governing decisions of this Court in the antitrust field (identified below in context), creates non-legislative exceptions to specific enactments of Congress, essentially eliminates tying arrangements from antitrust condemnation entirely, creates conflicts in several areas between the Ninth Circuit and the Fourth, Sixth and Eighth Circuits, and is based on recent views of the Antitrust Division of the Department of Justice that Congress then explicitly denounced.

It also imperils the existence of an entire industry, the independent distribution of replacement parts for automobiles. Under the reasoning of the decision, it is now lawful for American car manufacturers to return to the practices outlawed over 40 years ago.

In the area of issue preclusion, the decision is not only a long back step from *Blonder-Tongue Labs v. University Foundation*, 402 U.S. 313 (1971) and *Parklane Hosiery Co. v. Shore, supra*, 439 U.S. 322 (1979); it is a contradiction of the elementary basis of the law of issue preclusion.

In *Digidyne* this Court declined to review a holding in tying law that MBNA asked this Court to reverse as injurious to its defense in the present case. In *Metrix* this Court declined to review the Fourth Circuit's decision that the tying provision in MBNA's dealer agreement was unlawful, and that it was not saved by any business justification. We now ask the Court to review the decision below, which holds to the contrary of *Digidyne* and also contrary to *Metrix* relative to the same vendor, the same product, the same tie, and the same justification. When this Court denied certiorari in *Digidyne*, Justices White and Blackmun dissented from the denial because they believed that substantial issues of tying law were present which called for resolution. That view would seem certainly timely now. Similarly, one would think that MBNA, having urged that certiorari was warranted at the time of *Digidyne*, cannot consistently dispute that it is warranted now.

The Antitrust Division of the Department of Justice had sued MBNA under Sherman § 1, claiming a tying violation by the same provision of the Dealer Agreement involved in the present case and in the same court. After the court denied cross-motions for summary judgment, *United States v. Mercedes-Benz of North America*, 517 F.Supp. 1369 (N.D.Cal. 1981), the Antitrust Division dismissed all its tying cases throughout the country, thus abandoning enforcement of the law to private plaintiffs. The district court accepted the dismissal of the *Mercedes-Benz* case with reluctance, as beyond its power to reject (*United States v. Mercedes-Benz of North America*, 547 F.Supp. 399 (1982)).

What animated the Antitrust Division was a negative attitude about tying law, and in 1985 the Division summed up its views on the subject in its so-called "Vertical Restraint Guidelines". In its petition for certiorari in the *Metrix* case, MBNA relied on these guidelines and submitted to this Court that they reflect "contemporaneous antitrust jurisprudence". Congress reacted strongly. By a joint resolution in 1985 it denounced the "policy guidelines",

including those relative to "legality of tying arrangements" as "not an accurate expression of the Federal antitrust laws or of congressional intent".[5] Congress therein urged that these guidelines "not be accorded any force of law or be treated by the courts of the United States as binding or persuasive" and denounced them as "inconsistent with established antitrust law as reflected in Supreme Court decisions. . . . " In 1987 the House returned to its criticism of these administrative limitations on concepts of antitrust violation in enacting H.R. 585, referred to in fn. 3, at p.3, above.

We turn to demonstrate each of the foregoing reasons sufficiently, we submit, to warrant this Court's review.

I

On The Question Whether There Can Be A Defense Of "Business Justification" To An Otherwise Unlawful Tie

This case was decided for MBNA in the trial court *solely* on the defense of a "business justification". Affirming, the court below states (A-11, 12) that the "heart of this case [is] whether the tying arrangement was justified by business necessity". It proceeded, "[w]e have recognized that antitrust defendants may demonstrate a business justification for an otherwise *per se* illegal tying arrangement". It did not address the fact that the tie had also been held unlawful under the Rule of Reason.

On this subject of justification, there is a direct conflict between the Fourth Circuit and the decision of the Ninth. In its petition for certiorari in the *Metrix* case, which this Court denied last May, MBNA told the Court (at p. 9) that the Fourth Circuit had held that "MBNA had no valid business justification" and (at p. 15):

> "The practical dilemma faced by MBNA appears from comparing the Fourth Circuit's decision in the present case—which summarily rejected MBNA's business justifica-

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[5] The joint resolution was contained in the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act. (Act of Dec. 13, 1985, Pub. L. No. 180, Sect. 605, 1985 U.S. Code Cong & Ad. News (99 Stat.) 1169, 1170.)

tion defense—with the Ninth Circuit's subsequent decision in *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342 (9th Cir. 1987)—which accepted the defense."

Tying law was created in 1914 by Section 3 of the Clayton Act. When Section 1 of the Sherman Act later entered into the area of tying law it did so only because Clayton Act, § 3, does not apply unless both tied and tying products are commodities; if ties of services, intangibles or real property were to be reached, it became necessary to resort to Section 1 of the Sherman Act. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1214 (9 Cir. 1977).

As the present case involves goods and commodities, it falls under Clayton Act, § 3. In Part B below we consider the subject of "business justification" in a Sherman, Sec. 1, tie. We now submit that no "business justification" can exist to a Clayton Act, § 3, case.

A. Congress Allowed No "Business Justification" To A Tie Under Clayton Act, § 3, And Courts Cannot Create One

L. Sullivan, *Antitrust* (West, 1977) states (§ 151, p. 432; § 152, p. 440), that Congress' reason for enacting Section 3 of the Clayton Act in 1914 was its adverse reaction to the Rule of Reason this Court found in the Sherman Act in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and that Congress' purpose was to outlaw conduct not then thought to be prohibited by the Sherman Act. The special significance of Clayton Act, § 3, Professor Sullivan states, was that it suggested a more rigorous legal norm, a lower threshold of allowability, than the Sherman Act.[6]

When Section 1 of the Sherman Act was imported into tying law in order to reach ties of services, intangibles, or realty that Clayton Act, § 3, does not reach, arguably it would not balk the command of Congress about ties to allow a "business justification" to restraints that would fall outside any law and go unpunished if Clayton Act, § 3 were the only applicable law. But

[6] Professor Sullivan is favorably referred to (at p. 12) in H.R. Rep. No. 421. (See fn. 3, *supra*.)

whatever may be permissible in a Section 1 case—and we comment on that subject in Part B below—there is no room to permit any defense of business justification to a charge of violating Section 3 of the Clayton Act.

The prohibition of Clayton Act § 3 is declared legislatively, not judicially. It is direct, express, and specific. The statute, quoted in Appendix F, A-54, prescribes its own tests. Given the element of "commerce", all that is necessary to illegalize a sale on the condition, agreement or understanding that the purchaser shall not use or deal in commodities of a competitor of the seller is that the effect "may be to substantially lessen competition or tend to create a monopoly". *And that element was established in the present case by the special verdicts.* The Clayton Act says nothing about "reasonableness", that element has never been read into it, and only Congress can do so. As stated in H.R. Report No. 421, 100th Congress, 1st Sess. (1987)[7] "Congress has historically demonstrated an unequivocal role as the 'ultimate anti-trust policy maker' ". This Court acknowledged that it is not for the Courts "to indulge in the business of policy making in the field of antitrust legislation" (*Jefferson Cty. Pharm. Assn v. Abbott Labs*, 460 U.S. 150, 170 (1983).

The Court spoke directly to the point in *International B. Mach. Corp. v. United States*, 298 U.S. 131, 140, a Clayton § 3 case, decided in 1936 before resort to Sherman § 1 for tying occurred:

> "The Clayton Act names no exception to its prohibition of monopolistic tying clauses".

The decision below is in direct conflict with that decision. It is in conflict with the Third Circuit's decision in *Radio Corporation v. Lord*, 28 F.2d 257 (3 Cir.), *cert. denied*, 278 U.S. 648 (1928):

> "The defendant says that, for the sake of uniformity, efficiency, and durability, it is desirable to have these particular tubes, made by it, placed in these licensed sets or circuits to make them initially operative. This may or may not be true, but, if true, it makes no difference, for excellence

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[7] A report on H.R. 585, a bipartisan bill introduced in the House by Hon. Peter W. Rodino (D) and Hon. Henry J. Hyde (R).

of product does not justify the evasion or violation of the provisions of the Clayton Act."

The decision below ignores the basic teachings so often announced by this Court[8] that:

"The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results."

This Court has never recognized a business justification defense in a Clayton Act, § 3, case. Until now, no other court has done so. The decisions cited in the opinion below (at p. A-12) are not Clayton Act cases.[9]

The manner in which the court below held "justification" to be applicable in a Section 3 case was to posit applicability in a Sherman Section 1 case, and then, in a passing sentence, to say that it had treated the tests of a Section 3 violation and a Section 1 violation as "virtually the same" (A-18). That was a cavalier comment, for the cases then cited refer to another matter entirely. In *Times-Picayune Pub. Co. v. United States, supra*, 345 U.S. 594 (1953), a Sherman § 1 case, this Court held that in a Sherman § 1 case more was required to establish the necessary lessening of competition than in a Clayton, Sec. 3 case. It is this difference that late Ninth Circuit cases had suggested had "eroded", and in this respect only had the court treated the tests of a Section 3

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[8] As in *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912); *Associated Press v. United States*, 326 U.S. 1, 16, fn. 15 (1945); *Radovich v. National Football League*, 352 U.S. 445, 453, fn. 10 (1957).

[9] *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716 (9 Cir. 1981) involved a tie of telephone services. In *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9 Cir. 1977) the tying item was cemetery plots, not a commodity but realty. In *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203 (9 Cir. 1982), there was no claim of violation of Section 3 of the Clayton Act; the claim was violation of Sherman Act, § 1 (so stated p. 1207). This is so of *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476 (9 Cir. 1983); so stated at p. 1477. There the tied product was of "bookkeeping services" (p. 1477).

violation and a Section 1 violation as the same. The consequence was that the easier test for establishing liability under Section 3 had been carried into Section 1 cases. The effect was to increase liability in a Section 1 case, not to decrease it in a Section 3 case. *In none of these cases was there the remotest suggestion that judicial decision had increased the requirements of a Clayton § 3 violation by inserting into the Clayton statutory tests any defense which Congress had not seen fit to state in the statute itself.*

B. If Business Justifications Can Ever Be Recognized As A Defense To A Sherman Act, § 1, Tying Claim, It Can Only Be Where Specification Is Not Possible. Here It Was Conceded That It Was Both Possible And It Was Done

Until the present decision there had been some *dictum* that there could be a "business justification" defense, albeit an extremely limited one, to a Sherman Act, § 1, tying violation, but in no case had the defense been sustained.[10] The decision below is the first actually to do so. But even taking the *dictum* to be law, there are two essentials: (1) there must be no less restrictive alternative, and (2) as stated by this Court in *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949):

> "[T]he protection of the good will of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. . . . The *only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied.*"

The opinion below concedes: "*Mozart* is right, of course, when it insists that MBNA could have furnished design specifications

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[10] *In re Data General Corp. Antitrust Litigation*, 490 F.Supp. 1089, 1101 (N.D.Cal. 1980) observes, "[a]lthough both the Supreme Court and the Ninth Circuit have noted in *dicta* that business justifications may 'save' a tie-in, [citations omitted] neither court has held that any particular tie-in would have violated the antitrust laws but for legitimate business justifications".

for Mercedes replacement parts" (at A-16, 17). MBNA and its parent, Daimler-Benz, not only could, they did. They furnished the specifications for fast moving parts, those involved in this case, to Original Equipment Manufacturers (OEMs) both in Germany and the United States. MBNA confessed that it could not satisfy the requirement of impossibility of specifications. In its brief in the Fourth Circuit in the *Metrix* case it said (p. 31) that, "uncontroverted evidence was that DBAG in fact provides specifications for 50% of its parts, and that those parts in fact are produced by others—its OEM suppliers". In its petition to this Court for certiorari in the *Metrix* case, MBNA also conceded the fact.

The parts supplied by independent distributors were identical with those coming through MBNA. As one of MBNA dealer witnesses said, "We know these are identical parts furnished by the same factories and suppliers with one important difference. The independents are much lower in price" (Tr. 32-85). There were repeated complaints to MBNA by dealers about "customer resistance to the higher cost of maintaining the car" due to MBNA's prices for parts. MBNA bought 20% of its parts from OEMs in the United States, and independent distributors had access to the OEMs' entire line of parts. The other 80% came to MBNA from its parent DBAG, which bought half from German OEMs who sold the same items to American independent distributors. All these OEMs were furnished by DBAG with its specifications.[11]

The opinion below simply does not square with this Court's law as stated in *Standard Oil, supra.* It replaces this Court's law with another view, for it recognizes and allows a "business justification" where specification is both possible and done. It said (A-13, 14), the "fact that quality specifications is possible does not mean, therefore, that the tie-in is not necessary to assure high quality products". This not only contradicts this Court, its reasoning is directly contrary to what the Fourth Circuit held in the *Metrix* case, and with the conclusion reached by another careful

[11] Most of the other half, which DBAG manufactured, were the slow moving parts like engines and transmissions, which the independents did not handle.

contemporaneous study, that of the Monopolies and Mergers Commission of the United Kingdom.

In 1982 that Commission presented to Parliament in pursuance of Section 17 of the Competition Act of 1980 "A Report on the matter of the existence or the possible existence of a complex monopoly situation in relation to the wholesale supply of motor car parts in the United Kingdom" (London, Her Majesty's Stationery Office, HC318). The Commission reported that numerous motor car manufacturers, including the manufacturer of Mercedes-Benz automobile, had imposed on their dealers a requirement that the dealer purchase all replacement parts from the automobile vendor, and it quoted from the dealer agreement of Mercedes-Benz (United Kingdom) Limited, the counterpart in the United Kingdom of MBNA in the United States (Report, Appendix B, p. 58). The Report described the justification advanced by the car manufacturers and importers thus (pp. 46, 47):

> "[I]t would be damaging to their reputation and therefore against their commercial interests if inferior, unsuitable or unsafe parts were put into their cars since any subsequent failure which might result would tend to be associated with the car itself rather than attributed to the parts concerned. Insistence on exclusive buying of parts by their franchised dealers enabled car manufactures and importers to ensure the provision of appropriate parts, which together with the provision of adequate and competent service was part of the package they must offer if they were to compete successfully in the sale of cars."

This, of course, is the "justification" offered by MBNA and accepted by the court below. The Committee rejected the justification as unsound. It said (p. 47):

> " . . . it is not necessary for a manufacturer or importer to insist that his franchisees obtain spare parts exclusively from him.
>
> * * * *
>
> "The question which we are considering at this point is whether exclusivity benefits the public, not whether it suits

the interest of car manufacturers and importers. Our view is that the public interest is protected because franchisees have their own interest in ensuring that they do not supply their customers with inferior parts. For franchisors to attempt by insisting on exclusive buying to ensure that all parts stocked are of a standard approved also by them does not, in our judgment, confer on the public any additional benefit commensurate with the adverse effects set out in paragraphs 6.19 to 6.34."

The adverse effects so set out were that distributors of parts were excluded from the market (¶ 6.19), the provision constituted a "limitation of the extent to which component manufacturers can compete with one another and with car manufacturers and importers", effects a "restriction of price competition", places a "limitation on the level of service from which the franchised sector of the market can benefit" and constitutes "restriction of competition among factors" (¶ 6.34, p. 46).[12]

The reasoning of the court below in disregarding the law stated in *Standard Oil v. U.S.* is that there is no guarantee that other suppliers will adhere to the specifications. If that were justification for imposing a tying restraint, every manufacturer could impose one on its dealers, with impunity, and *Standard Oil* would be a dead letter. Both the Fourth Circuit and the United Kingdom Commission rejected that kind of reasoning, both held that the operations of a *free market* would adequately assure that

[12] The Report noted that the Dealer Agreement required the dealers to carry a sufficient stock of parts acquired from Mercedes-Benz to supply those who wished parts coming from Mercedes-Benz. It found nothing wrong about that provision, and Mozart has not assailed a similar provision in MBNA's Dealer Agreement. But the Commission found no justification for the further absolute requirement. MBNA's agreement also provided that the dealer not represent to a customer that a part not obtained from MBNA had been. Mozart did not criticize that requirement. What it prohibited would be a common-law fraud; indeed, a California statute enacted in 1975, and several statutes of other states, contained identical prohibition (Cal. Vehicle Code, § 12001). The vice of the Dealer Agreement is that it went far beyond these legitimate prohibitions.

products not coming through the automobile vendor would be of equal quality with those coming from it, if specification were available, for the dealers "have their own interest in insuring that they do not supply their customers with inferior parts". Thereby the English Commission followed the uniquely American anti-trust concept that the *free market*, not artificial restraints, best protects competition. The Fourth Circuit observed that "MBNA's judgment of its dealers and consumer" ran contrary to the Sherman Act's policy that competition rules the marts of trade.

The issue about "business justification" is not one of bare fact peculiar to a particular case, such as whether a person ran a stoplight. It goes to a legal standard. *The law has laid down a strict standard, important to the enforcement of antitrust policy.* Ever since the Federal Trade Commission decision in *The Matter of General Motors Corporation, et al, supra*, 34 F.T.C 58 (1941), American manufacturers of automobiles have not used a tying clause like that here. With the blessing of the court below, they will now do so. The decision spells the end of an *entire industry* in the United States, that of independent suppliers of replacement parts to automobile dealers.[13]

Less Restrictive Alternative

As noted above, dictum giving any recognition to a "business justification" conditions it upon absence of a less restrictive alternative, and the Fourth Circuit in *Metrix* held that one of the reasons the justification defense failed was that there were such alternatives. MBNA's petition for certiorari in the *Metrix* case told this Court (p. 10) that the Fourth Circuit held that MBNA need only to require

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[13] The opinion below suggests in a footnote (A-14) that Mozart did not challenge the instructions on justification. The fact that the court's comment is in a footnote indicates that it did not mean to suggest that Mozart had waived its contention. Plainly it did not. Mozart had presented all its objections about justification, first by motion for summary judgment, then by requests for an instruction directing a verdict, then by request for further instructions after the evidence was in, and then by motion for directed verdict before anything was given to the jury.

"its dealers to tell customers that the parts used in repair work were not genuine; it could prevent free-riding on warranties by stamping MBNA's parts with identifying numbers; and it could assure quality control and maintain goodwill through specification of standards to suppliers."

These are much the same as the statements of the Monopolies and Mergers Commission of the United Kingdom. And, as noted above (p. 2), when MBNA first adopted its Dealer Agreement it considered but rejected a less restrictive alternative.

II

"Business Justification" Is No Defense To A Claim Of Violation Of Sherman Act, § 2, By An Attempt To Monopolize

Petitioner asserted not only a claim of unlawful tying but also a claim of an attempt to monopolize in violation of Section 2 of the Sherman Act. The decision of the court below on this issue conflicts with decisions of the *Eighth and Sixth Circuits.*

Facts entering into a tying arrangement may also enter into an attempt to monopolize, but the elements of the two are not identical. Under a given set of facts, there may be one or the other or neither or both. The elements of the offense of an attempt to monopolize are two: (1) a specific intent to monopolize and (2) some anticompetitive act or acts done in furtherance of that intent.[14]

The trial court declined to let the jury pass on the claim. Its reasoning was that, if the jury awarded damages on the Sherman

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[14] Concerning a third element of "dangerous probability of success", Ninth Circuit law is notoriously obscure and so recognized by that court, (*Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925, 926 (9 Cir. 1980), *cert. denied*, 450 U.S. 921 (1981)). But that element is not material in this case, for *to* "monopolize" does not mean acquisition of 100% of the relevant market. *United States v. Grinnel Corp.*, 384 U.S. 563, 570-71 (1966). Even under the most extreme calculations of its counsel, MBNA had at least 70% of the market. Affirmance of the judgment will make it a certainty that MBNA will enforce its tying clause so as to have 100% of the Mercedes dealer market for replacement parts.

Act, § 1, tying claim, there would be no need for the Section 2 claim, and, if the jury should find neither *per se* nor Rule of Reason violation of tying law, the anticompetitive element necessary to an attempt to monopolize would be absent. But the events show that these were not the alternatives. The verdicts landed in between; they *found unreasonable anticompetitive conduct that did restrain trade.* Accordingly, Mozart moved for a directed verdict of liability on Sherman § 2 claim with instruction to the jury to determine impact and damages. Alternatively, it moved that the entire claim of attempt to monopolize be given to the jury on appropriate instructions including an instruction that "business justification" is not a defense to a violation of § 2 by an attempt to monopolize.

Anticompetitive conduct having been found, the only remaining question could be presence of "specific intent". The court below affirmed on the reasoning that failure to prove a substantive tying claim was the death knell of a § 2 claim, on the basis that "specific intent" can only be shown by "proof of unfair or predatory conduct" (at p. A-18). On this premise, having stripped MBNA's conduct of being "unfair or predatory" by virtue of "business justification", it eliminated "specific intent".

But it cannot be the law that "specific intent" can only be shown *circumstantially* by proof of unfair or predatory conduct. Intent is a state of mind. Because leeway must be given to prove state of mind, the law indulges a plaintiff to establish the necessay state of mind by inference from unfair or predatory conduct. But that indulgence in allowing a plaintiff to prove specific intent by inference cannot mean that a plaintiff may not establish specific intent directly. That it did here. Implicit in the finding of "business justification" was the finding that MBNA specifically intended to acquire all the replacement part business. On the instructions on which the verdict of "business justification" had to be based, "business justification" referred to a supposed objective fact, *viz.*, that the tying requirement that *all* replacement parts be obtained from MBNA was the only way that safety and quality of the automobiles could be assured. A finding that MBNA was justified in imposing and enforcing the tie because it was necessary to preserve the quality of its automobile *necessarily* finds that MBNA's *intent* was to reserve all the business of replacement

parts to its dealers. Doubtless that finding included a finding of MBNA's "motive" for seeking to *possess all the parts business*, but there is a time honored difference between "motive" and "intent". Motive is the inducement which leads one to desire a certain result; intent is the purpose to use the particular means to reach the result.[15] A man's "motive" to murder another may be that the victim raped the man's wife, but the "intent" is nonetheless to kill.

Antitrust law is concerned with intent, not with motive. As often as a claim of good "motive" has been advanced as an antitrust defense, this Court has rejected it, *Associated Press v. United States, supra,* 326 U.S. 1, 16, fn. 15 (1945); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101, fn. 23 (1984). Where the assailed conduct consists of exclusion of competition, a motive to benefit the defendant or, in the defendant's judgment, the public, is irrelevant. It is Congress that has declared monopolization to be illegal, regardless of motive.

In any event, if the very "justification" was not conclusive proof of "specific intent", the issue whether there was intent should have been put to the jury.[16]

The short of the matter is that the court below has allowed a "business justification" defense to an attempt to monopolize violation of Sherman Act, § 2, and this holding is in conflict, not only with the principles this Court has pronounced, it is in direct conflict with the Sixth and Eighth Circuits.

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[15] *Hamill v. Maryland Cas. Co.,* 209 F.2d 338, 341 (10 Cir. 1954); *Weir v. Commissioner of Internal Revenue,* 109 F.2d 996, 998 (3 Cir. 1940).

[16] Direct testimony extracted from MBNA's officers and witnesses was that the purpose of the tying clause in the dealer agreement was to obtain *all* the replacement part business of Mercedes dealers. MBNA's president, Karlfried Nordmann, so admitted (Tr. 4-84). The head of its dealer organization, Wayne Armstrong, admitted that the desire to eliminate outside suppliers was "inherent" (Tr. 7, 56-57). Dealers were told that to buy from anyone but MBNA was "in violation of the Torah" (Tr. 5, 167-169).

In *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8 Cir. 1982) the court said (p. 1183):

> "Whether a co-op's given business practice is unlawful thus is not merely a question of whether it is 'predatory' in a strict sense, *e.g.*, lacking a legitimate business justification. As the Sixth Circuit recently noted, '[a]n anticompetitive practice may have economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal.' *United States v. Dairymen, Inc.*, 660 F.2d 192, 195 (6th Cir. 1981). That Court squarely rejected the argument that Section 2 prohibits co-op's only from engaging in narrowly defined 'predatory practices.' *Id.* at 194. We agree.... Where such an unlawful intent is clear, overt acts in furtherance of this purpose are not immunized simply because they might also have other justifications or because they are merely 'anti-competitive' rather than 'predatory.'"

In *United States v. Dairymen, Inc.*, 660 F.2d 192 (6 Cir. 1981), the court said (pp. 194-95):

> "In this case the district court set too high a burden on the Government when it required the Government to show that D.I.'s practices rose to the level of predatory practices, *i.e.*, anticompetitive practices *without any business justification*. The offense of attempt to monopolize requires only that the defendant has engaged in anticompetitive conduct with a specific intent to monopolize and that there was a dangerous probability that the attempt would be successful. [Citations omitted.] The district court did not determine whether D.I. used its full supply and committed supply contracts and exclusive hauling contracts with the specific intent to monopolize, and it is necessary to remand this case for that determination.
>
> "Although there is evidence of economic justification for the use of full supply and committed supply contracts, the question of intent is paramount. An anticompetitive practice may have economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal."

Business justification has to do with motive. This Court has frequently said that it is Congress that has determined that competition must be free and unrestrained, and, therefore, that it is irrelevant whether a particular restraint is "good" or "fair". All that counts is the impact on competitive conditions; other arguments or considerations are out of place. *United States v. Topco Associates*, 405 U.S. 596, 610-12 (1972).

III

THE DECISION BELOW IS IN CONFLICT WITH ELEMENTARY LAW OF COLLATERAL ESTOPPEL

The jury verdict and decision in *Metrix* held that MBNA's dealer agreement was an unlawful tie and rejected the "business justification" defense. Although the court below held that the *Metrix* decision was a *final one*, it nevertheless refused to hold MBNA barred by collateral estoppel. Its sole basis for that holding was that the two cases are "based on different *evidentiary* facts" (A-11). As the facts supposed to constitute "justification" are precisely the same in the two cases, the statement refers to supposed difference in the *evidence*. It is gratuitous, but we can pass the error, because *difference in evidence is irrelevant*. Nothing is more elementary than that one cannot escape the bar of a former decision by offering new, additional, or different evidence. As 1 B Moore's Federal Practice, pp. 726-727, states:

> "[T]he fact that the prior judgment was simply incorrect will not affect its conclusiveness. This is true *no matter how slight was the evidence* on which a determination was made, in the first suit, of the issue to be collaterally concluded".

As colorfully put in *United States v. Silliman*, 167 F.2d 607, 617 (3 Cir.), *cert. denied*, 335 U.S. 825 (1948):

> "If an issue is raised and the party who has the burden fails in its proof and the issue is decided against him, he is just as much bound by collateral estoppel as though he had presented *a barrel* of testimony."

A multitude of cases so hold. E.g., *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 2 (1 Cir. 1983):

"Pignons offers new theories, evidence, and arguments. . . . It is just this type of argument, however, that collateral estoppel bars Pignons from making. Pignons had a fair opportunity to make these arguments and to introduce this evidence the first time. The law requires the courts to offer Pignons nothing more, for collateral estoppel implements 'the principle that one opportunity to litigate an issue fully and fairly is enough.' [Citation omitted.] Once a plaintiff has had a chance to prove a fact, he cannot reopen the matter simply by stating that he wishes to introduce more or better evidence". [Citations omitted.]

So also, *Continental Can Co. of U.S.A. v. Marshall*, 603 F.2d 590 (7 Cir. 1979). All that is necessary for a collateral estoppel or issue preclusion is that the party to be bound had a "full and fair opportunity to litigate" the issue, *Blonder-Tongue Labs v. University Foundation, supra*, 402 U.S. 313, 328. MBNA had that opportunity in the *Metrix* trial and exercised it when it was defending against a claim exceeding $7 million. It put in all the evidence it then thought necessary. Having then suffered an adverse verdict, it could avail it nothing to summon more witnesses on the same issue in the *Mozart* trial. To allow it to profit by doing so would be to defy the statement in *Allen v. McCurry*, 449 U.S. 90, 94 (1980):

"As this Court and other courts have often recognized, *res judicata* and collateral estoppel . . . by preventing inconsistent decisions, encourage reliance on adjudication."

The decision runs afoul of the teaching of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), where the same Ninth Circuit was reversed for disregarding basic principles of *res judicata*. Quoting, the Court stated that it has long recognized that "[p]ublic policy dictates that there be an end of litigation", and that the principle "should be cordially regarded and enforced by the courts" (p. 401). The court below showed a miscomprehension of the law of collateral estoppel as this Court has developed it from *Blonder-Tongue* through *Allen v. McCurry*, when it remarked (A-11):

"It would be a curious use of affirmative collateral estoppel to permit one who had lost before the jury on certain facts to

> overturn that verdict by pointing out that on different facts, but identical legal principles, the winner before the jury had lost a jury verdict to a stranger on an earlier day and in a different court".

The decision below on this issue is a genetic "sport", one of those aberrations that occasionally bubble to the surface to bedevil the law until authoritatively scotched. We submit that it deserves to be summarily scotched now before it produces mischievous offspring.

IV

The Decision Rests On A Mind-Set That Tying Arrangements Raise No Antitrust Concerns. It Substitutes Word Fomulations For Reality In Rejecting *Digidyne* And In Ignoring The Jury Verdict Of Unreasonableness Under The Rule Of Reason

The opinion refers to the "debate whether tying arrangements raise antitrust concerns" (A-4, 5, fn. 2), and it is animated by the belief that the "Chicago School" is correct in arguing that they do not, undaunted by this Court's reaffirmation in *Hyde* that they do. The verdict of unreasonableness under the Rule of Reason should have obviated resort to the sometimes subtle analysis necessary to determine whether *per se* law applies. Yet the Court of Appeals reasoned as if petitioner's case rose or fell on *per se* law. It dwells on a "*per se* tying standard" (A-4, et seq.) and holds that the instructions to the jury on what constitutes "market power" for a *per se* violation were "flawed".

In its decision of the last several years, limiting *per se* application in antitrust cases, most recently in *Business Electronics Corp., supra*, this Court has emphasized that attention must be given to economic realities rather than to "formalistic distinctions". It is therefore wry that what the opinion below does in its treatment of the subject is to engage in formalistic word distinctions. To borrow the words of Professor Petofsky, quoted at p. 14 of the H.R. Rep. No. 421 referred to in fn. 3, *supra*, it is a "triumph of ideology over practicality, of theory over common sense".

This it does when it holds that a "prestigious trademark" is no evidence of market power. The expression, "prestigious trade-

mark", is merely a figure of speech, a metaphorical way of saying that, for one reason or another, Mercedes-Benz possessed a unique ability to make the opportunity of dealers to buy the automobile for resale so *appealing* that the dealers succumbed to the requirement to buy replacement parts from MBNA.

If a buyer elects to buy one product from the vendor of another product for price, convenience or terms, that is competition at work. But if, extraneous to the merits of the *tied* product, the seller has a leverage, whatever it may be, in the tying product, which compels purchase of the tied product, it should matter not of what the leverage consists. MBNA told this Court in its petition for certiorari in the *Metrix* case (p. 4) that the Mercedes automobile "enjoys public perception of the highest quality" and (p. 23) "consistently has finished at or near the top among all automobiles in consumer satisfaction polls". The evidence established that a dealership to sell Mercedes automobiles in the United States is the *most valuable dealership* in the business, because profits on Mercedes-Benz cars were the greatest in the country. Therefore dealers did not wish to run the risk of losing the dealership. Dealer after dealer testified that they would not sell a Mercedes dealership for $5 million, or $10 million, or for *any* amount of money. But the term of a dealership was only two years and had to be reviewed biannually. A dealership, moreover, was terminable on breach of any clause of the agreement, *including the tying clause.* Rather than risk loss of the dealership, dealers were willing to succumb to the requirement that they buy all replacement parts from MBNA, although it charged from 40% to 60% more for its parts. Mercedes-Benz had *a mystique* that gave it that leverage. The jury's verdict so found. This reality is submerged by the opinion below in abstrusities which replace common sense perception and ill serve antitrust law's emphasis on free competition.

Mozart claimed that the market for sale of replacement parts for Mercedes cars to Mercedes dealers was the relevant market, and that issue was put to the jury by appropriate instruction, with much evidence. The verdict for Mozart on the issue of reasonableness embraced a finding that there was no rival producer of the tying product; only MBNA could supply it; it had 100% of that market.

The court below would deprive a trademark of any weight because a trademark "protects only the name or symbol of the product" and that "market power, if any, is derived from the product" (A-8). This is word-chopping. Name or symbol is merely emblematic of the power of the product.

No one can offer a Mercedes-Benz car for sale but Mercedes-Benz. That car has a mystique that gave its manufacturer the economic power to compel purchase of replacement parts from it. No sound reason can be advanced why that should not be sufficient anticompetitive conduct to concern the law.

CONCLUSION

We respectfully submit that this Court should issue the writ.

Dated: San Francisco, California; June 20, 1988.

*Moses Lasky
Lasky, Haas, Cohler & Munter
Attorneys for Petitioner The Mozart Company

* *Counsel of Record*

Appendix A

For Publication

United States Court of Appeals
For the Ninth Circuit

Nos. 86-1733;
86-2156

D.C. No.
CV-81-0531-MHP

The Mozart Company, a corporation,
Plaintiff-Appellant,

v.

Mercedes-Benz of North America, Inc., a corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
May 13, 1987—San Francisco, California

Filed December 9, 1987

Before: Joseph T. Sneed, Arthur L. Alarcon and
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Sneed

OPINION

COUNSEL

Moses Lasky, Lasky, Haas, Cohler & Munter, San Francisco, California, for the plaintiff-appellant.

George A. Cumming, Jr., Brobeck, Phleger & Harrison, San Francisco, California, for the defendant-appellee.

OPINION

Sneed, Circuit Judge:

Mozart Co. (Mozart), an auto parts distributor and manufacturer, alleged various antitrust violations by Mercedes-Benz of North America, Inc. (MBNA), arising out of MBNA's franchise agreements with its dealerships. The agreements required each franchisee to deal exclusively in replacement parts supplied by MBNA. Following an eleven-week jury trial, the jury rendered a special verdict, finding that, although MBNA had violated the Sherman Act by way of a tying arrangement, there was a business justification for the conduct. The district court entered judgment for MBNA without submitting Mozart's other claims to the jury. Mozart appeals the district court's judgment that it take nothing, and also appeals the court's award of costs to MBNA. We affirm.

I

FACTS AND PROCEEDINGS BELOW

Defendant-appellee MBNA has been the exclusive United States distributor of Mercedes-Benz automobiles since 1965. MBNA is a wholly-owned subsidiary of Daimler-Benz Aktiengesellschaft (DBAG), the German manufacturer of Mercedes automobiles and their replacement parts. Daimler-Benz of North America, Inc. (DBNA) is the exclusive United States importer of DBAG products.

MBNA markets its passenger cars and genuine and approved replacement parts through approximately 400 franchised dealerships. Each dealer becomes party to a standard written Dealer Agreement, the second part of which contains numerous "Standard Provisions." Paragraph 9C of that part of the agreement provides:

> Dealer shall neither sell or offer to sell for use in connection with MB passenger cars nor use in the repair or servicing of MB passenger cars any parts other than genuine MB parts or parts expressly approved by DBAG if such parts are necessary to the mechanical operation of such MB passenger cars.

Part one of the Dealer Agreement defines "MB parts" as "parts, accessories, components, assemblies, and optional equipment for MB passenger cars supplied by MBNA, DBAG, or DBNA."

In January, 1982, plaintiff-appellant Mozart, successor in interest to Eurasian Automotive Products, Inc., a wholesale automotive parts distributor, brought suit against MBNA for alleged violations of §§ 1 and 2 of the Sherman Act, and § 3 of the Clayton Act, 15 U.S.C. §§ 1, 2, and 14. Mozart based its case on Paragraph 9C of the Dealer Agreement between MBNA and each Mercedes-Benz franchised dealer. It contended that it constituted a per se tying violation of 15 U.S.C. §§ 1 and 14. Mozart alleged additionally that MBNA conspired with the franchised dealers to boycott independent replacement parts distributors, in further violation of § 1, and also that MBNA attempted to monopolize the sale in the United States of replacement parts usable in Mercedes automobiles in violation of § 2. The complaint charged improper conduct between the years 1975 and 1979.

In September, 1984, the district court denied the parties' cross-motions for summary judgment in a published opinion and order. *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 593 F. Supp. 1506 (N.D. Cal. 1984). The court found that the Mercedes passenger car and its replacement parts were separate products tied together by the terms of Paragraph 9C of the MBNA Dealer Agreement, and that the tying arrangement affected a substantial amount of interstate commerce. *Id.* at 1523. The matter proceeded to trial on the issues of: (1) whether MBNA had sufficient economic power in the tying product market to restrain competition in the tied product market; (2) whether MBNA had a legitimate business justification for the tying arrangement; and (3) the conspiracy and monopoly claims. *Id.* at 1523-24.

Trial began August 6, 1985. At the close of Mozart's case in chief, the court granted MBNA's motion for a directed verdict on the conspiracy to boycott claim. At the close of all the evidence, the court submitted the case to the jury only under the Sherman Act § 1 tying claim. It declined to give to the jury the attempted monopolization and Clayton Act § 3 claims. The jury returned a special verdict, finding that MBNA had violated Sherman Act § 1 under both the per se test and the Rule of Reason Test, but that MBNA had a business justification for its tying arrangement. The district court untangled matters by determining that MBNA had not violated § 1.[1] The court denied Mozart's motion for judgment notwithstanding the verdict. The district court then directed a verdict for MBNA on the Clayton Act § 3 and Sherman Act § 2 claims. On November 20, 1985, the court rendered its final judgment that Mozart take nothing. Mozart timely filed a notice of appeal. On June 2, 1986, the district court taxed costs of $110,877.23 against the plaintiff. Mozart also filed an appeal from this post-judgment order.

As indicated above, we affirm. To do so we need address in depth only appellant's contentions that the district court erred in refusing to invoke collateral estoppel as appellant insisted it should and that the business justification defense was inapplicable as a matter of law. First, however, we shall explain why these two issues are controlling in our view.

II

THE PER SE TYING STANDARD

In *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2 (1984), a bare majority reaffirmed the per se rule against tying.[2]

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[1] Technically, there is no "violation" of the Sherman Act if the defendant prevails on a business justification defense. *See infra* section IV.

[2] Two Justices relied on Congress' silence as a justification for preserving the per se rule. *See* 466 U.S. at 32 (Brennan, J., concurring). Four Justices, recognizing that tying arrangements may have procompetitive effects, would analyze these arrangements under the Rule of Reason. *See id.* at 32-47 (O'Connor, J., concurring). Thoughtful antitrust scholars have expressed serious doubts about the alleged anticom-

The majority opinion concluded that it was "far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition." *Id.* at 9. Three elements are necessary to establish a per se illegal tying arrangement: "(1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and (3) an effect on a non-insubstantial volume of commerce in the tied product market. *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys.*, 732 F.2d 1403, 1407 (9th Cir. 1984). As stated previously, the district court determined as a matter of law that the Mercedes passenger car and its replacement parts were separate products tied together by the terms of paragraph 9C of the MBNA Dealer Agreement, and that the tying arrangement affected a substantial amount of interstate commerce. 593 F. Supp. at 1523. The market power issue, the second element of the per se standard, was submitted to the jury, and the jury found that MBNA possessed the requisite power in the tying product, the Mercedes passenger car.

The majority in *Hyde*, rather than abandoning the per se rule against tying, chose to limit antitrust liability for tie-ins by insisting on a showing of actual market power in the tying product. 466 U.S. at 13-17. Tying arrangements receive per se condemnation "when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market." *Id.* at 13-14. The primary purpose of the rule against certain tying arrangements is to stop the extension of market power from one product to

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petitive effects of tie-ins. *See* 5 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 1129c, 1134b (1980); R. Bork, *The Antitrust Paradox* 372-75 (1978); *see also Hirsch v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1349 n.19 (9th Cir.) (criticizing reasons asserted in support of the antitrust law's harsh treatment of tying arrangements), *cert. denied*, 459 U.S. 973 (1982). The close division on the rationale in *Hyde* was attributable in part to the debate over whether tying arrangements raise antitrust concerns.

another.[3] *Id.* at 13 & n.19. Such extension of power is impossible unless the seller has substantial market power in the tying product.

The instructions employed in submitting this issue to the jury were flawed, however. That flaw pertained to the "market power" that the defendant must possess in the tying product to justify the invocation of the per se standard. The required "market power" must be sufficient "to force a purchaser to do something he would not do in a competitive market." 466 U.S. at 14. Such "forcing" is the equivalent of increasing the price of the tying product to increase profits. *Id.* at 27 n.46. Such power is the hallmark of monopoly power, *viz.*, the ability to increase price by restricting output.

In *Hyde,* the Court identified three sources of market power. First, when the government has granted the seller "a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power." 466 U.S. at 16 (citing *United States v. Loew's, Inc.,* 371 U.S. 38, 45-47 (1962)). The second is when "the seller's share of the market is high." *Id.* at 17 (citing *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 611-13 (1953)). The third is when "the seller offers a unique product that competitors are not able to offer." *Id.* Mozart's theory of this case is that the Mercedes automobile is sufficiently unique to confer economic power on MBNA in the tying product.

The district court properly instructed the jury that the Mercedes-Benz franchise trademark and the Mercedes-Benz automobiles together constitute the tying product. Reporter's Transcript

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[3] This so-called "leverage theory" has been criticized because modern economic thought seems to indicate that all available monopoly profits could be obtained from the tying product alone without the use of a tie-in. *See* R. Bork, *supra,* at 373. Tying arrangements are also viewed with disfavor because they can be used to facilitate price discrimination. Where the quantity of sales of the tied product measures the buyer's intensity of use of the tying product, the seller may be able to exact a premium from the more intensive users by charging above-cost prices for the tied product. There are no allegations that the tying arrangement here fosters price discrimination.

(R.T.) of Oct. 18, 1985, at 23. The jury also was instructed, in part, as follows:

> In deciding whether MBNA had sufficient leverage, you may consider the fact that MBNA controlled who could use the Mercedes trademark and whether the trademark had any goodwill among the car-buying public. A prestigious and desirable trademark can be persuasive evidence of economic power.
>
> MBNA had the necessary leverage if the evidence shows that the Mercedes automobile was sufficiently unique to give MBNA a competitive advantage in the sale of automobiles. If new Mercedes cars were sufficiently desirable to dealers, then MBNA was likely to have sufficient leverage to restrain the tied product market; that is, the market for replacement parts sold to Mercedes dealers and necessary to the mechanical operation of the Mercedes car.

Id. at 26. These two instructions reveal the flaws referred to above.

First, a prestigious trademark is not itself persuasive evidence of economic power. It is true that we have previously held that *copyright* protection may be evidence of market power because it creates barriers to entry for competitors in the tying market. *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1341 (9th Cir. 1984), *cert. denied,* 473 U.S. 908 (1985).[4] However, unlike a patent or copyright, which is designed to protect the uniqueness of

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[4] To the extent that the panel's opinion in *Digidyne* indicates that the presumption of market power is warranted merely by the existence of copyright protection, the *Digidyne* view has been rejected by several courts and commentators. *See, e.g., A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 1659 (1986); Note, *The Presumption of Economic Power for Patented and Copyrighted Products in Tying Arrangements,* 85 Colum. L. Rev. 1140, 1156 (1985); *see also Hyde,* 466 U.S. at 37 n.7 (O'Connor, J., concurring) (patent holder has no market power if there are close substitutes for the patented product). Two Justices who favor retention of the per se rule against tie-ins would have granted certiorari in *Digidyne* because of the panel's failure to

the product itself, a trademark protects only the name or symbol of the product. Market power, if any, is derived from the product, not from the name or symbol as such. *See* Klein & Saft, *The Law and Economics of Franchise Tying Contracts,* 28 J. Law & Econ. 345, 356 (1985).

Second, the court's instructions indicate that somehow market power can be proven from the uniqueness of the Mercedes automobile. The difficulty with this is that while many individual purchasers of automobiles undoubtedly regard a Mercedes as unique, it is by no means clear that franchisees (dealers) view the Mercedes in the same manner. To them it is an article that is purchased at wholesale and sold at retail. The critical issue is whether MBNA possesses the "market power" to force dealers to purchase the tied product rather than acquire the franchise to sell a different automobile. Obviously there are costs in surrendering one franchise and acquiring another, but these are costs unrelated to the "market power" of a unique automobile. These costs will enable the car maker to extract concessions from the dealer, but this power is related to the franchise method of doing business, not to the possible uniqueness of the car. The upshot is that the district court's jury charge was improperly focused. It fails to anticipate adequately the basic fact that the "market" at issue is the market for dealership franchises.

However, we do not find that the flawed instructions necessitate a reversal of the judgment. The instructions were more favorable to the appellant than would be a proper recasting. We turn now to the crucial issues of this case.

III

COLLATERAL ESTOPPEL

It so happened that *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft,* No. CV-N-79-2066, was pending in the federal district court for the District of Maryland as this case unfolded below. The *Metrix* case involved claims and issues quite similar to those in this case. Metrix, an independent distributor of

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engage in market analysis. *See* 473 U.S. 908 (1985) (White, J., joined by Blackmun, J., dissenting from denial of certiorari).

replacement parts, brought suit against MBNA on a tying charge under Sherman Act § 1. The jury in *Metrix*, rejecting the business justification defense accepted by the jury in this case, returned a verdict against MBNA for damages of $2.3 million, and judgment upon that verdict was entered. These events occurred before the present case went to trial.

Based upon the jury verdict in *Metrix*, Mozart moved to have MBNA adjudicated as collaterally estopped from contesting its liability under Sherman Act § 1. On June 3, 1985, the district court tentatively ruled that there was a collateral estoppel. Court Record (C.R.) at 547. However, on June 19, 1985, the *Metrix* court awarded a new trial on the issue of damages. Upon this new development the district court in this case refused to apply collateral estoppel. The court ruled that the judgment in *Metrix* lacked the requisite degree of finality to support collateral estoppel. C.R. at 548.

On October 7 1985, the *Metrix* court granted MBNA leave to file an interlocutory appeal with respect to liability and several other issues under 28 U.S.C. § 1292(b). The Fourth Circuit accepted the appeal, and a cross-interlocutory appeal by *Metrix*, and decided the case on September 14, 1987, a date subsequent to the submission of this appeal for decision. *See Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir. 1987). The issues disposed of by the Fourth Circuit are succinctly stated to have been as follows:

> As presented by the parties on appeal, and as interpreted by this court, the issues raised by the certified questions are whether *Pick Manufacturing Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936), established an automobile exception to Sherman Act liability for tying arrangements; whether MBNA proved as a matter of law that its tying arrangement was based on a legitimate business justification; whether the jury's Sherman Act damage award was against the clear weight of the evidence; and whether the district court misapplied the standards for granting a judgment notwithstanding the ver-

> dict or, alternatively, a new trial on MBNA's Robinson-Patman Act counterclaim.

Id. at 1035 n.4.

The Fourth Circuit's disposition of these issues was (1) that *Peck* did not establish a "broad-based exception to the Sherman Act," *id.* at 1039; (2) that MBNA's evidence in support of its business justification defense would not support a directed verdict and judgment notwithstanding the verdict and that the jury instructions with respect to the burden of proving business justification were not improper; (3) that the trial court did not abuse its discretion in granting MBNA a new trial on damages, *id.* at 1042-45; and (4) that the district court erred in granting a judgment notwithstanding the verdict, or, alternatively, a new trial on MBNA's Robinson-Patman Act counterclaim.

Mozart in its briefs and oral argument insisted that, even though the Fourth Circuit's decision in *Metrix* had not been handed down, it nonetheless collaterally estopped MBNA from contesting its Sherman Act liability. This led to argument concerning the type of finality that a prior judgment must have to permit its use for purposes of collateral estoppel. *See Luben Indus. v. United States,* 707 F.2d 1037 (9th Cir. 1983). Also at issue was the point in time such required finality must be attained to justify overturning a judgment of the district court which, as is the situation in the case before us, had refused to invoke collateral estoppel.

The Fourth Circuit's decision significantly alters the focus of our concerns. We recognize that its decision possesses the required attributes of finality. We also are now persuaded that the fact that this decision is subsequent in time to the district court proceedings in the case before us does not bar any preclusive effect that the *Metrix* case might possess. In reaching this conclusion, we are guided by *Los Angeles Unified School District v. Los Angeles Branch, NAACP,* 714 F.2d 935, 939-40 (9th Cir. 1983), which gave a state court decision, that became final after the judgment of the district court, preclusive effect on the review of that judgment on appeal. Therefore, we now turn our attention to *Metrix* to determine whether it affords Mozart the means by which the jury verdict against it can be overturned.

We hold that it does not. We start from the proposition that the case before us is based on different evidentiary facts from those in *Metrix*. Moreover, *Metrix* involved no principle of law that should collaterally estop MBNA from asserting its business justification defense and from resisting successfully any effort to overturn the jury verdict in its favor.

The precise holdings of the *Metrix* court make this clear. The rejection of *Peck* as the basis of any exception to the Sherman Act by *Metrix* does not impair MBNA's jury verdict. It never seriously relied on *Peck*. More importantly, it did not win on that basis. Its victory rested on the acceptance by the jury of MBNA's business justification defense. *Metrix* did not reject the business justification defense: it merely held that in that case the evidence presented by MBNA to make out that defense was not sufficiently strong to support setting aside a jury verdict holding that no such defense was established. MBNA in this case established to the satisfaction of the jury that a business justification did exist. It would be a curious use of affirmative collateral estoppel to permit one who had lost before the jury on certain facts to overturn that verdict by pointing out that on different facts, but identical legal principles, the winner before the jury had lost a jury verdict to a stranger on an earlier day and in a different court. Issue preclusion in its affirmative form is not that expansive. Finally, it is abundantly clear that the *Metrix* holdings regarding the granting a new trial on damages and the Robinson-Patman Act counterclaims have no bearing on this case.

We hold, therefore, that the district court did not abuse its discretion in refusing to permit Mozart to invoke collateral estoppel.

IV

BUSINESS JUSTIFICATION

This brings us to the heart of this case, whether the tying arrangement was justified by business necessity. We have recognized that antitrust defendants may demonstrate a business justi-

fication for an otherwise per se illegal tying arrangement.[5] *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1482 (9th Cir. 1983); *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1225-28 (9th Cir. 1982); *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 738-39 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1217 (9th Cir. 1977). A tie-in does not violate the antitrust laws "if implemented for a legitimate purpose and if no less restrictive alternative is available." *Phonetele*, 664 F.2d at 739. The defendant bears the burden of showing that the case falls within the contours of this affirmative defense. *Id.*

The justification asserted by MBNA is that the tying arrangement is necessary to assure quality control and to protect its goodwill. The difficulty confronting MBNA is the problem of "freeriding" by Mercedes dealers. To MBNA it is crucial that a dealer operating under a franchise distribution arrangement offer standardized products. Only then can customers confidently rely on the Mercedes name. Franchisees, on the other hand, experience a conflict of interest. True, they wish to maintain the goodwill of MBNA, but some will yield to avarice and increase their profits by supplying inferior products while continuing to attract customers at the expense of those dealers who conform to the quality standards. The cost of these transgressions will be borne by all franchisees in the form of decreased future demand. Although a consumer may realize that a particular franchisee "cut the corner," the adverse reaction of consumers as a group is not confined to that particular franchisee because they are appro-

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[5] It may seem somewhat anomalous to permit justifications for arrangements that are apparently subject to per se condemnation. However, per se rules are simply examples of presumptions that exist throughout antitrust law, and "easy labels do not always supply ready answers." *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 8 (1979). Before applying the per se label we must determine whether the challenged practice is one of those types that "is 'plainly anticompetitive' and very likely without 'redeeming virtue.'" *Id.* at 9. Allowing the defendant to assert a business justification defense is one way of inquiring into whether the reasons for the relatively categorical historical condemnation of tie-ins apply to the challenged arrangements.

priately reacting to the poor job of policing done by the franchisor. In plain fact, the "corner cutter" imposes costs on all concerned with the product.

To exonerate a franchisor's tie-in quality control technique from the antitrust law, there must be a finding that no less restrictive alternative exists.[6] Frequently less restrictive alternatives do exist. *See e.g., Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949); *International Salt Co. v. United States*, 332 U.S. 392, 397-98 (1947); *International Business Machs. Corp. v. United States*, 298 U.S. 131, 138-40 (1936); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 46-47 (5th Cir. 1976); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

It has been suggested that the quality control defense be viewed with less skepticism than it usually has been accorded. It has been argued that tying arrangements are more effective and less costly than alternative methods for ensuring franchisee compliance with quality specifications. Simply specifying quality standards contractually will be ineffective because, as already pointed out, the franchisee has a financial incentive to "cut corners," to "freeride." The franchisor must police compliance with the specifications, and policing costs will be substantial, if not prohibitive. The fact that quality specification is possible does not mean, therefore, that the tie-in is not necessary to assure high-quality products. *See*

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[6] The most notable exception to the general rejection of the quality control defense is *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). There the court held that Jerrold's requirement that buyers of its television system also purchase installation and repair service was necessary to protect Jerrold's business reputation. *Id.* at 557-60. However, the court seemed to limit the defense to nascent firms entering a technologically complex industry. *Id.* at 560.

The quality control defense was also successful in *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965). The *Susser* court held that the tie of ice cream purchases to a trademark license was legitimate because it would have been difficult to specify contractually the "desired texture and taste of an ice cream cone or sundae." *Id.* at 520.

Klein & Saft, *supra*, at 351-54 (discussing tie-ins as a mechanism to economize on policing costs). Furthermore, penalties against the "corner cutters" must be imposed. Termination of the "corner cutter's" franchise may be difficult to achieve because, *inter alia*, inasmuch as standards generally do not capture all elements of quality, breach may be difficult to prove. *Id.* at 353 & n.26.

Designating particular suppliers, a possible alternative to quality specification, requires policing compliance at the manufacturer level, which may be just as difficult as at the franchisee level. Moreover, the suppliers also will be under competitive pressure to "cut corners" by supplying low-quality products to franchisees who are more concerned with price than quality. Even if the franchisor buys from the same suppliers as do the franchisees, there is no certainty that the products purchased by franchisees will be of equal quality. To ascertain the quality of parts purchased by franchisees would require quality control testing at the franchisee level. In sum, designating a supplier would require testing at both supplier and purchaser-franchisee level. For these reasons, it has been argued that the efficiency loss from alternative methods of quality control may outweigh any potentially anticompetitive effects of a tying arrangement. With this background we now turn to the alleged justification in this case.

We begin with the fact that, pursuant to instructions that Mozart does not, and could not, challenge, the jury found in MBNA's favor. These instructions were in accordance with the prevailing law regarding business justification.[7] Mozart, from

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[7] The instructions were as follows:

> If you find that the tying agreements in this case were unlawful either because they were per se violations of the Sherman Act or because they were unreasonable under the Rule of Reason test, you must then determine whether they were warranted by a business justification. The burden is on the defendant to demonstrate the existence of a business justification. And again, you will recall the burden of proof that I explained to you earlier, but for this purpose, that burden is upon the defendant.
>
> In considering the question of business justification, you must bear in mind that a tying agreement can be justified only if there is no less restrictive alternative. Even if some sort of regulation is

necessity, rests its appeal on a challenge to the sufficiency of the evidence. We will affirm the jury verdict and the denial of Mozart's motion for judgment n.o.v. if there is substantial evidence to support a finding for MBNA. *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1442 (9th Cir. 1986). We are not free to reweigh the evidence or reach a result we find more reasonable if, viewing the evidence in the light most favorable to MBNA, there is substantial evidence in favor of the jury's verdict. *Wilcox v. First Interstate Bank*, 815 F.2d 522, 525 (9th Cir. 1987).

Mozart contends that the business justification defense fails for two reasons: 1) the quality control justification is without merit, because replacement parts of appropriate design and quality are available from other sources, and 2) even if the quality control concern is legitimate, less restrictive alternatives for achieving the same goal are available.

Substantial evidence exists to support MBNA's claim that the tie-in was used to assure quality control. MBNA purchases approximately 80% of its replacement parts from DBAG. Of those parts half are manufactured by DBAG itself, and half are acquired by DBAG from other original equipment manufacturers (OEMs). These OEMs produce the parts according to DBAG manufacturing and quality control specifications. A selection of

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reasonably necessary to promote the business of the parties, a less restrictive regulation must be adopted instead of a more restrictive one. No anticompetitive restraint is permissible which is broader or more onerous than reasonably necessary to achieve a goal even where the goal is legitimate.

Defendant's claimed business justification is that the restraint protected the quality of the Mercedes automobile. In order to establish its business justification defense, defendant must show that the tying arrangement was necessary to protect the quality of the automobiles, and that replacement parts of appropriate quality are unavailable from sellers other than defendant itself. In other words, defendant cannot prevail on its business justification defense unless it has sustained its burden of proving that its tying arrangement is the only way the safety and quality of MB cars can be assured.

R.T. of Oct. 18, 1985, at 40-41.

each shipment of OEM parts, which has already passed through one round of inspection, is tested a second time by DBAG. If any of the test parts is deficient, the whole lot is rejected. The remaining 20% of the replacement parts purchased by MBNA come directly from OEMs that have met DBAG's quality and inspection standards. Thus, most, but not all, of MBNA parts are subjected to DBAG's elaborate and rigorous inspection procedures. Mozart purchased most of the parts it sold from OEMs in the United States.

MBNA introduced evidence showing that DBAG's strict testing standards helped to assure the high quality of replacement parts. R.T. at 31-13 to 25; 19-45 to 49. MBNA maintains an excellent reputation in the automobile industry for reliable service and quality replacement parts. In fact, 75% of Mercedes automobile owners are repeat purchasers, and over one-third of the owners return to the dealer for service and repairs. *Id.* at 29-179 to 29-190. There was considerable testimony by dealers and employees of MBNA about the inferiority of parts supplied by independent jobbers. *Id.* at 25-180 to 183; 23-17, 18; 28-104 to 107; 29-130 to 133; 31-5 to 31-12. Although Mozart introduced evidence to the contrary, the jury was entitled to make credibility determinations in favor of MBNA. We hold that there was ample evidence to support a finding that the tying arrangement is a legitimate means of maintaining the quality of Mercedes replacement parts supplied by dealers, and thereby protecting the reputation of the MBNA product.

Mozart argues alternatively that, even if MBNA's alleged justification is legitimate, the quality control defense fails because MBNA neglected to utilize less restrictive alternatives. The jury's verdict could have been reached only by its determination that there was no less restrictive alternative. *See* R.T. of Oct. 18, 1985, at 40-41. No other conclusion is possible so long as it is assumed, as we must, that the jury followed its instructions.

Mozart insists that MBNA could have furnished manufacturing specifications for replacement parts, and that such specification would eliminate the need for a tie-in. The jury rejected this contention. Mozart is right, of course, when it insists that MBNA could have furnished design specifications for Mercedes replace-

ment parts. That alone, however, does not eliminate the business justification defense. MBNA proffered evidence that DBAG's vigorous testing programs could not be replicated by individual dealerships. *Id.* at 31-38, 39; 27-8, 9; 22-40 to 42. The evidence further indicates the impracticality of Mozart's suggestion that MBNA could have inspected all replacement products furnished to independents. There was evidence from which the jury could find that the cost of such an undertaking would be prohibitive. We do not believe MBNA was required as a matter of law to take such extreme steps to protect its legitimate interest in assuring public confidence in the quality of its trademarked product. There is substantial evidence to support the jury's finding that the only feasible method for maintaining quality control is the use of the tying arrangement. Therefore we affirm the judgment for MBNA on the Sherman Act § 1 tying claim.

V

OTHER CLAIMS

In addition to the claim of illegal tying, Mozart slightly recast that claim by alleging the MBNA engaged, with its dealers, in a conspiracy to boycott independent distributors. The district court granted a directed verdict for MBNA at the close of plaintiff's evidence. A defendant may "rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." *Richards v. Neilson Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). "Once a defendant has met this initial burden, a plaintiff must provide specific factual support for its allegations of conspiracy tending to show that the defendant was not acting independently." *Id.*

MBNA offered the plausible business justification of quality control as a reason for its "tying" agreements with all 400 dealers. Mozart points to no specific evidence tending to establish that MBNA was acting in concert with its dealers to protect MBNA and the dealers from competition. We, therefore, affirm the district court's directed verdict on the conspiracy to boycott claim.

Mozart also contests the district court's grant of a directed verdict on its Clayton Act § 3 claim and its Sherman Act § 2 attempt to monopolize claim. The district court held that the

jury's finding of business justification disposed of these claims as well as the Sherman Act § 1 tying claim.

We have stated that the elements for establishing a Sherman Act § 1 claim and a Clayton Act § 3 claim are virtually the same. *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1189 n.2 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985). There is no reason for allowing a business justification for a § 1 claim and not for a § 3 claim. To our knowledge no court has ever made such a distinction. Courts permit a business justification defense to tying claims because of a frank recognition that a package transaction with substantial justifications and few harmful effects should not be condemned. That recognition appplies with equal force to the Sherman Act and the Clayton Act. The § 3 claim fails with the § 1 claim.

In order to support an attempt to monopolize claim the plaintiff must prove specific intent, which must be shown by proof of unfair or predatory conduct. *Drinkwine v. Federated Publications*, 780 F.2d 735, 740 (9th Cir.), *cert. denied*, 106 S.Ct. 1471 (1986). Predatory conduct is "conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition." *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986).

A tying agreement supported by a legitimate business justification cannot be characterized as the type of predatory anticompetitive, or unfair conduct that is necessary to support a Sherman Act § 2 claim. Mozart's failure to prove its tying claim precludes it from asserting an attempt to monopolize claim arising out of the same conduct. *See Airweld*, 742 F.2d at 1191 n.3.

The district court properly granted a directed verdict on the Clayton Act § 3 and the Sherman Act § 2 claim.

IV

COSTS

Mozart seeks to have the award of costs against it overturned. Because we affirm the judgment for MBNA, we also affirm the

award of costs against Mozart. Costs of this appeal are also assessed against Mozart.

The judgment of the district court is AFFIRMED.

Appendix B

United States District Court,
N.D. California.

No. C-81-0531-MHP.

The Mozart Company, a corporation,
Plaintiff,

v.

Mercedes-Benz of North America, Inc., a corporation,
Defendant.

Sept. 18, 1984.

Moses Lasky, Lasky, Haas, Cohler & Munter, San Francisco, Cal., for plaintiff.

Malcolm T. Dungan, George A. Cumming, Jr., Michael B. Flesch, Brobeck, Phleger & Harrison, San Francisco, Cal., for defendant.

OPINION AND ORDER

PATEL, District Judge.

This is an antitrust action, presently before the court on cross-motions for summary judgment. Plaintiff The Mozart Company, successor in interest to Eurasian Automotive Products, Inc., a wholesale automotive parts distributor, brought suit against defendant Mercedes-Benz of North America ("MBNA") alleging violations of §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act, 15 U.S.C. §§ 1, 2, and 14. Mozart contends that provisions of the Dealer Agreement between MBNA and each Mercedes-Benz franchised dealer constitute a per se tying violation of 15 U.S.C. §§ 1 and 14. Plaintiff alleges additionally that MBNA conspired with the franchised dealers to boycott independent replacement parts distributors, such as Eurasian, in further violation of § 1, and also attempted to monopolize the sale in the United States of replacement parts usable in Mercedes automobiles in violation of § 2. Defendant objects to the use of a per se rule and argues that a rule of reason standard should apply in this case. Since, according to defendant, the evidence Mozart has

introduced concerning MBNA's alleged conduct involving threats, coercion and intimidation would be insufficient to permit plaintiff to prevail under a rule of reason standard, defendant's motion for summary judgment should be granted.

This court has had previous occasion to deal with most of the issues raised in this litigation. In *United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369 (N.D.Cal.1981) ("*MBNA*"), after detailed consideration of the arguments raised by both parties, the court held that the per se standard applied. It then proceeded to deny both the government's and MBNA's motions for summary judgment and ordered the case to proceed to trial on "the issue of defendant's economic power and, if that be established, whether defendant can demonstrate sufficient business justification for a tying arrangement." *Id.* at 1373. At the same time, the court held that no factual dispute existed as to whether the Mercedes-Benz automobile and Mercedes replacement parts were two separate products tied together by the MBNA Dealer Agreement, or whether the agreement affected a not insubstantial amount of interstate commerce. *Id.* at 1391.

Other courts have also considered tying arrangement claims brought against MBNA. In *IAP, Inc. v. Mercedes-Benz of North America, Inc.*, 571 F.Supp. 262 (D.N.J.1983) ("*IAP*"), the court went on at some length about the history of automobile production in general and the manufacture of replacement parts in particular. *Id.* at 265-67. It then cited *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir.), *aff'd per curiam*, 299 U.S. 3, 57 S.Ct. 1, 81 L.Ed. 4 (1936), which held that since "[t]he preservation of the good will of the public is directly involved," General Motors did not violate § 3 of the Clayton Act by requiring Chevrolet and Buick dealerships to sell only genuine GM replacement parts or parts authorized by GM. 80 F.2d at 643-44. According to the *IAP* court, *Pick* created an automobile replacement parts "exception" to antitrust law that, in essence, forecloses any tying claim of this sort against any automobile manufacturer. 571 F.Supp. at 167-68.[1]

[1] The specific issue before the *IAP* court was whether plaintiffs, instead of meeting defendant's motion for summary judgment, could dismiss their complaint with prejudice to themselves and without costs,

In another action against Mercedes, *Metrix Warehouse, Inc. v. Daimler-Benz A.G.*, 1982-2 Trade Cas. (CCH) ¶ 64,861 (D.Md.1982) ("*Metrix I*"), the court denied both parties' motions for summary judgment for substantially the same reasons as this court did in *MBNA*. *Id.* at 72,280. Following the decision in *IAP*, however, the *Metrix* court reconsidered its earlier opinion, concluded that *Pick* was controlling precedent, and granted summary judgment in favor of Daimler-Benz and MBNA. *Metrix Warehouse, Inc. v. Daimler-Benz A.G.*, 1984-1 Trade Cas. (CCH) ¶ 65,766 (D.Md.1982) ("*Metrix II*"). Then, following the opinion of the Supreme Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, ____ U.S. ____, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) ("*Hyde*"), the court determined that its second opinion in the case had been "premature," concluded that *Hyde* showed the notion of a *Pick* exception to be untenable, vacated *Metrix II*, and reinstated *Metrix I*. *Metrix Warehouse, Inc. v. Daimler-Benz A.G.*, No. N 79-2066 (D.Md. June 11, 1984) ("*Metrix III*").

Now this court must decide once again whether summary judgment should be in favor of or against MBNA. After thorough consideration of the extensive documentary evidence, memoranda, and oral argument presented by both parties, the court has concluded that it must deny both motions for summary judgment. The court has found no reason to disturb its previous determination that a per se standard should be used to test the alleged tying violation at issue here. It also remains clear that Mercedes-Benz automobiles and Mercedes replacement parts are two separate products tied together by the MBNA Dealer Agreement, and that this arrangement affects a not insubstantial amount of interstate commerce. Substantial factual disputes exist regarding whether MBNA had sufficient economic power to coerce its dealers into the tying arrangement and a conspiracy to boycott, and, if that is

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but without prejudice to members of a purported class of plaintiffs which they attempted to have certified. 517 F.Supp. at 263-65. The court determined, *inter alia*, that since defendant had gone to great expense and trouble to prepare its motion for summary judgment, and plaintiffs had never met that motion as required by the Rules of Civil Procedure, defendant's motion for summary judgment would be granted. *Id.* at 269-70. The court's discussion of the nature of plaintiffs' claim and the *Pick* "exception" was therefore unnecessary in deciding the issue before it.

demonstrated, whether MBNA had sufficient business justification for its conduct. There is also dispute regarding the issue of MBNA's attempt to monopolize the sale of Mercedes replacement parts.

I. Factual Background[2]

Defendant MBNA, since 1965 the exclusive United States distributor of Mercedes-Benz automobiles, markets its passenger cars and genuine and approved replacement parts through approximately 400 franchised dealerships.[3] Each dealer becomes party to a standard written Dealer Agreement, the second part of which contains numerous "Standard Provisions." Paragraph 9C of that part of the agreement provides:

> Dealer shall neither sell or offer to sell for use in connection with MB passenger cars nor use in the repair or servicing of MB passenger cars any parts other than genuine MB parts or parts expressly approved by DBAG if such parts are necessary to the mechanical operation of such MB passenger cars.

Part one of the Dealer Agreement defines "MB parts" as "parts, accessories, components, assemblies, and optional equipment for MB passenger cars supplied by MBNA, DBAG,[4] or DBNA."[5]

Plaintiff rests its claim of a per se illegal tying arrangement on Paragraph 9C quoted above. Mozart contends further that in connection with this arrangement MBNA coerced its dealers into

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[2] For a more detailed discussion of MBNA's operational structure and parts distribution system, see this court's opinion in *United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369, 1373-74 (N.D.Cal.1981).

[3] This case deals only with replacement parts. It is not argued nor could it be that parts for original use are separate products. Furthermore plaintiff's claim does not involve warranty parts. (Pl.'s Mem.Supp.Summ.Judgment, at 48; Pl.'s Reply Mem., at 23).

[4] Daimler-Benz A.G., the manufacturer of Mercedes automobiles, trucks and other vehicles, and their replacement parts.

[5] Daimler-Benz of North America, Inc., the exclusive United States importer of DBAG products.

a conspiracy to boycott all independent replacement parts distributors, such as Eurasian Automotive Products, and also attempted to monopolize the sale of Mercedes replacement parts in the United States.

II. The Applicable Standard

In *MBNA*, defendant's primary arguments in favor of its own motion for summary judgment were that "because of the nature of its franchise [arrangements], per se tying standards are inapplicable and that a rule of reason is the appropriate standard for determining restraint of trade." 517 F.Supp. at 1374. Even though this court determined in that action that a per se tying standard did indeed apply, MBNA repeats the same argument in this proceeding, contending that the cases of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) and *Jefferson Parish Hospital Dist. v. Hyde, supra*, plus a series of franchise/trademark cases decided by the Court of Appeals for the Ninth Circuit, compel a different result. According to Mercedes, these cases, taken together, stand for the proposition that tying arrangements are not per se illegal unless they are imposed upon the ultimate consumer. This means, contends defendant, that the law of tying essentially has no application to exclusive dealing arrangements between franchisors and franchisees. These remarkable conclusions do not find support in the authority MBNA cites. Neither *GTE Sylvania* nor *Hyde* provides a basis for the argument that a per se standard should not apply in this case, and the Ninth Circuit cases relied upon only support the theory that MBNA "may condition the sale of the passenger *car* on use of the Mercedes-Benz trademark." *MBNA*, 517 F.Supp. at 1374 (emphasis in original).[6]

[6] These cases, *California Glazed Products, Inc. v. Burns & Russell Co.*, 708 F.2d 1423 (9th Cir.) *cert. denied*, ___ U.S. ___, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983); *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276 (9th Cir.) *cert. denied*, ___ U.S. ___, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983); *Hamro v. Shell Oil Co.*, 674 F.2d 784 (9th Cir.1982); and *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir.1982) all consider whether the products involved in the alleged tying arrangements were "separate products," not

As this court pointed out in *MBNA, GTE Sylvania* essentially overruled *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967) and criticized the *Schwinn* court for departing from a long line of authority treating vertical restrictions as subject to the rule of reason and for adopting the per se rule without performing the analysis required by *Northern Pacific Railway Co. v. United States* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). While some may have believed *GTE Sylvania* argued the Supreme Court's abandonment of the per se rule, *Hyde* certainly has dispelled that notion insofar as tying arrangements are concerned. Unlike its observation in *GTE Sylvania* that some vertical restrictions have an economic benefit, the court in *Hyde*, using a *Northern Pacific* analysis, announced its continuing belief that most tying arrangements are inherently anticompetitive.[7] Furthermore, application of the per se rule to tying arrangements has a thirty-seven year history. By contrast the per se rule was short-lived in vertical restriction cases. Moreover, the reasoning of the *GTE Sylvainia* opinion gives no hint that the per se rule "long . . . applied to tying arrangements because of 'their pernicious effect on competition and lack of any redeeming virtue'" was no longer to be applied to those cases. *MBNA*, 517 F.Supp. at 1377 (quoting *Northern Pacific Ry. Co.*, 356 U.S. at 5, 78 S.Ct. at 518). Defendant's assertion that *GTE Sylvania* somehow upsets established tying law is therefore clearly without foundation.

Mercedes nevertheless contends that *Hyde* all but forecloses the use of a per se standard in tying cases. The case holds, according to defendant, that a per se standard can be used only if the alleged tying arrangement is shown, through market analysis,

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whether a per se standard applied. These cases are therefore discussed, *infra*, in the "separate products" section.

[7] Justice O'Connor argued forcefully that tie-ins have economic utility. However, she could persuade only three other members of the Court to join her. In her rationale she relied in part on the reasoning of Justice White in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969) (*"Fortner I"*). Justice White, however, joined with the *Hyde* majority in upholding the per se rule.

to impose an actual restraint on the ultimate consumer's freedom of choice.

This argument mischaracterizes the holding and reasoning of the case.[8] In fact the court could not have made it clearer: "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and are therefore unreasonable 'per se.'" 104 S.Ct. at 1556. The essential characteristic of such an arrangement, the Court continued, is the seller's power to "force" a purchaser to do what he would not do in a purely competitive market. When it is "probable" that a consumer would be "forced" into the purchase of the tied product because of the seller's "market power" in the tying product market, per se condemnation, which is by definition "condemnation without inquiry into actual market conditions," is warranted with respect to the arrangement. *Id.* at 1558-60. Such market power can be demonstrated, the Court noted, by a showing that the "seller's share of the market is high" or by evidence that he "offers a unique product that competitors are not able to offer . . . ." *Id.* at 1560-61. The alleged tying arrangement at issue in *Hyde* was an exclusive contract between the hospital and a firm of anesthesiologists that provided for all anesthesiological services offered by the hospital to be performed by the firm. *Id.* at 1554-56. Because there was no showing that the hospital had any probable forcing power in the tying product market of hospital services, the per se standard was not applicable in that case. *Id.* at 1561-67.

Hyde thus makes no change in the law concerning the use of a per se standard in tying cases. The three-part test articulated by this court in *MBNA* continues to have validity. *See Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1338 (9th Cir. 1984). There is also no indication in *Hyde* or in any other authority that tying analysis is only relevant when the tie is imposed on the ultimate consumer. The alleged tie-in in *Hyde*

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[8] Defendant's reading of the Court's opinion is based largely on the concurring opinion of Justice O'Connor, which, although MBNA disagrees, clearly is at fundamental variance with the opinion of the Court regarding the continued validity of per se analysis. *See*, 104 S.Ct. at 1569, 1576 (O'Connor, J., concurring).

was imposed on the consumer of hospital services, and was therefore analyzed from that perspective. Nothing in the case suggests that all tying cases must be analyzed from that point of view, and no other cases impose that criterion. In *Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc.*, 475 F.Supp. 973 (D.Mass.1979), plaintiff automobile dealers contended that a requirement by Toyota that they use Toyota delivery services in order to purchase Toyota passenger cars was an illegal tying arrangement. Agreeing that the dealers were the appropriate consumers from whose perspective the tie should be analyzed, the court concluded that the plaintiffs should be allowed to go to trial on their claim, noting that "dealer freedom of choice is an important value protected by tie-in law." *Id.* at 984. *Accord, Grappone, Inc. v. Subaru of New England, Inc.*, 534 F.Supp. 1282, 1289 (D.N.H.1982); *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F.Supp 824, 835 (N.D.Ga. 1976).

In *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir.1983), Mobil dealers contended that the parent company had, among other things, coerced them into a tying arrangement that required them to purchase other Mobil products in addition to gasoline in order to retain their dealerships. The court viewed the evidence to indicate that "Mobil dealers were used as captive consumers of Mobil products," and were therefore victims of an illegal tying arrangement. *Id.* at 1211.

Finally, in the recent case of *Digidyne*, the court determined that defendant Data General's refusal to license a software system except to purchasers of its "central processing units" was an illegal tie. 734 F.2d at 1338. Data General sold these materials "primarily to original equipment manufacturers ("OEMs") who combine them with application software . . . to create a complete computer system for resale." *Id.* at 1342. The tie was therefore imposed on these OEMs, not on the ultimate consumer of the finished computer product. *Id.* at 1342-44. Thus, defendant's "ultimate consumer" argument is without merit.

Hyde also appears to put to rest any possibility that *Pick* creates an "automobile replacement parts exception" to antitrust tying law. In *MBNA*, this court suggested that "the law of tying has evolved substantially since 1935 and . . . the considerations relied

on by that court are more properly construed as possible arguments for a business justification defense rather than as reasons mitigating against the application of a per se standard." 517 F.Supp. at 1376. As noted above, the *IAP* and *Metrix II* decisions have since appeared to give some new vitality to *Pick*. This is not the case, however. The discussion of *Pick* in *IAP* was dictum unnecessary to the result the court reached.[9] What is more, the court relied for this dictum solely upon *Pick* without any discussion of the lengthy history of tying cases after *Pick*. *Pick* was decided in 1935 and affirmed by the Supreme Court in 1936. Adoption of the per se rule in tying cases did not take place until 1947 when the Supreme Court decided *International Salt Co. v. United States*, 332 U.S. 392, 396, 68 S.Ct. 12, 15, 92 L.Ed. 20 (1947). Since *International Salt* there have been substantial developments in the law of tying and application of the per se rule. All of this was inexplicably ignored by the *IAP* court.

The *Metrix II* court reconsidered its opinion regarding *Pick* after *Hyde* was decided, and issued *Metrix III*, which succinctly states that "*Jefferson Parish* [*Hyde*] concisely summarizes the state of tie-in law, and leaves no room for the so-called *Pick* 'exception.'" *Id.* at 3. *Pick* clearly has no current application other than shedding light on the business justification defense explained below.

III. Per Se Tying Standard

Given the continued vitality of the per se standard as applied to tying cases, it remains to be determined whether the arrangement at issue in this case is an illegal tie which warrants per se condemnation. As this court noted in *MBNA*, a plaintiff must make three important demonstrations in order to establish a per se illegal tying arrangement:

> "1. Two separate products with the sale of one conditioned on the purchase of the other;
>
> "2. A seller with sufficient economic leverage in the tying market to appreciably restrain competition in the tied product market; and

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[9] *See*, note 1, *supra*.

"3. A tie-in affecting a not insubstantial amount of interstate commerce."

517 F.Supp. at 1378 (citations omitted); *see also Digidyne*, 734 F.2d at 1338. Other cases have suggested an additional requirement: that some "modicum of coercion" be exerted upon the purchaser of the tied product by the seller of the tying product. *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 732 F.2d 1403, 1407 (9th Cir.1984); *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1479 (9th Cir.1983). If the plaintiff establishes the above elements, defendant may defend itself "by an affirmative showing of business justification." *MBNA*, 517 F.Supp. at 1378; *see also Moore v. James H. Matthews & Co.*, 550 F.2d 1207, 1217 (9th Cir.1977) ("*Moore I*").

The development of the coercion aspect is less than clear. In attempting to characterize it, one court suggested that tying law is "a kind of semantic shell game." *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1223 (3d Cir.), *cert. denied*, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976). Some courts have looked at coercion in terms of whether the two products were, in fact, tied together, i.e., whether the purchaser was required to buy the tied product in order to get the tying product. *Id.* at 1224. Other have examined it in terms of market power, concluding that coercion is likely if a seller has a patent, a unique product or a substantial market share. *See Robert's Waikiki*, 732 F.2d at 1407.

Under whatever rubric, coercion is a necessary element of an illegal tying arrangement. From the early days of per se application the rule has been that when a buyer is free to purchase the product separately there is no coercion. *Northern Pacific Ry. Co.*, 356 U.S. at 6 n. 4, 78 S.Ct. at 518 n. 4. This year in *Hyde* the Supreme Court emphasized the need for some coercion holding that the per se rule may only be used "if the existence of forcing is probable." 104 S.Ct. at 1560. However, the Court goes on to evaluate it in terms of market power, saying that "the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate." *Id.* at 1561. From all this it is possible to conclude that the likelihood of some coercion must be shown and that

ordinarily if the purchaser must purchase the tied product in order to get the tying product and the seller has market power in the tying product coercion may be presumed. For the reasons explained in subparagraph A.2 and subparagraph B below, plaintiffs have clearly established the "modicum of coercion" necessary to invoke the per se standard. Thus the court finds coercion based on the Dealer Agreement and the fact of its acceptance by a large number of dealers who have stated they believe they had no choice. That evidence, while sufficient to show forcing is likely, is not sufficient to meet the more rigorous requirement of market power sufficient to impose significant restraints on competition in the tied product market.[10]

A. Separate Products Tied Together

1. Two Separate Products

In *MBNA*, defendant contended that the Mercedes-Benz passenger car and its replacement parts were not separate products. In making this argument it relied upon a number of authorities, but principally *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir.1980), *cert. denied*, 451 U.S. 970, 101 S.Ct. 2047, 68 L.Ed.2d 349 (1981), which held that McDonald's franchisees could be required to operate only on premises leased to them by the parent company. This was not an illegal tying arrangement, reasoned the court, because "the challenged aggregation is an essential ingredient of the franchised system's formula for success," making the franchise and the premises lease "a single product." *Id.* at 309. MBNA contended that the Mercedes replacement parts arrangement was like the McDonald's lease requirement, since "the purchase of MBNA replacement parts is an 'integral component' of its [MBNA's] franchised business method." *MBNA*, 517 F.Supp. at 1380.

This court rejected that argument, noting that while the McDonald's arrangement was essential to the company's purpose of providing fast food products, the basic purpose of a Mercedes-

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[10] The court in *Moore I* also noted that the seller of the tying product should have an economic interest in the tied product. 550 F.2d at 1216. *MBNA* clearly has an economic interest in the allegedly tied replacement parts. *MBNA*, 517 F.Supp. at 1378 n. 10.

Benz franchise was the distribution of Mercedes-Benz passenger cars, not Mercedes replacement parts. *Id.* at 1380-81. It was held that "[t]here is nothing inherent in the Mercedes-Benz franchise or trademarked automobile that prevents . . . replacement parts from being provided from non-approved sources." *Id.* at 1381. Notwithstanding this reasoning, defendant, citing a number of recent trademark/franchise cases that essentially stand for the same proposition as *Principe*, renews the same contention here. This court must again reject it.

MBNA relies principally on *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir.1982). In that case, ice cream store franchisees contend that "Baskin-Robbins ice cream products are unlawfully tied to the sale of the Baskin-Robbins trademark." *Id.* at 1351. The court rejected this claim. Distinguishing between a "business format" franchise system and a "distribution" franchise structure, it noted that while a "business format franchise is usually created merely to conduct business under a common trade name," with the distributor franchise "the franchised outlets serve as conduits through which the trademarked goods of the franchisor flow to the ultimate consumer." *Id.* at 1353. Since "the Baskin-Robbins trademark merely served to identify the ice cream products distributed by the franchise system," the ice cream and its trademark were not separate products, and tying law therefore had no application to the case. *Id.* at 1354.

None of that is relevant to this case. MBNA vigorously insists that *Krehl* stands for the proposition that "the law of 'tying' has no application at all to exclusive dealing arrangements used by manufacturers in the distribution of products to consumers through retail outlets displaying the manufacturer's trademark" (Def.'s Brief Opp. Summ. Judgment at 27), and that MBNA can therefore require its franchised dealers to sell only genuine or approved Mercedes replacement parts. This reasoning mischaracterizes *Krehl*. The court in that case said tying law did not apply to that particular situation because the purpose of the franchise was to distribute the trademarked ice cream; the trademark and the product it identified were therefore not separate. The purpose of a Mercedes-Benz franchise, as this court previously held, is the sale of Mercedes-Benz automobiles. *MBNA*,

517 F.Supp. at 1381. The Mercedes-Benz passenger car and its trademark are therefore not separate products. That reasoning could not be extended to cover any and all other products a franchisor may wish to distribute through a franchisee, however, without swallowing the whole of antitrust tying principles. Indeed, such a state of affairs would make it possible for MBNA or any other franchisor to require its franchisees to distribute "any product it decided to manufacture," whether or not those products were essential to the purpose of the franchise. *Id.* at 1380. *Krehl* cannot be read to support such a result.[11]

The other cases cited by defendant are likewise unavailing. In *Hamro v. Shell Oil Co.*, 674 F.2d 784 (9th Cir. 1982), a Shell service station operator alleged that the requirement that he purchase Shell gasoline in order to obtain a Shell franchise was an illegal tying arrangement. *Id.* at 786. In rejecting the claim, the court merely determined that the Shell trademark and the gasoline the franchise had been established to distribute were not separate products. *Id.* at 787-88.

In *California Glazed Products, Inc. v. Burns & Russell Co.*, 708 F.2d 1423 (9th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983), a trademark licensee who manufactured finished masonry blocks alleged that an agreement requiring it to purchase from the licensor the trademarked ingredients to finish the blocks was an illegal tie. *Id.* at 1426. The court rejected the claim, holding that since the license existed for the purpose of distributing the trademarked ingredients, those ingredients and its trademark were not separate products. *Id.* at 1427-30.

In *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276 (9th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983), the assignee of the claims of a number of individual pharmacies contended that a

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[11] Defendant makes much of the argument that since a Mercedes franchise is a "distribution" franchise rather than a "business format" franchise, *Krehl* and the other franchise cases apply to this litigation. As has been clearly demonstrated, Mercedes passenger cars and their replacement parts are separate products; these arguments about the format of the franchise aid MBNA not at all with respect to the sales of replacement parts.

health insurance provider's policy of dispensing drug benefits only through its own pharmacy was an illegal tying arrangement. *Id.* at 1284. The court held that this arrangement came within the "business of insurance" exception to antitrust law provided by the McCarran-Ferguson Act, and was therefore not an illegal tie. *Id.* at 1284-87. Plaintiff alleged further, however, that the requirement that subscribers to the health plan exercise their drug benefits only at the provider's pharmacy also constituted an illegal tying arrangement. *Id.* at 1288-89. The court rejected this claim, holding that since the subscriber's "purchase of drugs in the required manner was the consummation of the pharmacy benefit, not an unwanted and unnecessary product tied to the desired product," the pharmacy benefit and the restriction on the use of pharmacy services were one product. *Id.* at 1289-90.

Some comments the *Klamath* court made are relevant to the present action. Referring to the "function of the aggregate" test articulated in *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955, 92 S.Ct. 1172, 31 L.Ed.2d 232 (1972), the court said that "[s]eparateness is determined in part by whether the products are normally sold or used as a unit and whether their joint sale effects savings beyond those of combined marketing. [Citation to *Siegel*, 448 F.2d at 48.] The critical factor is the extent to which a producer's offerings are in response to independently structured consumer demand." 701 F.2d at 1289. The Supreme Court has defined the two-product inquiry as whether there is a "sufficient demand" for the purchase of the tied product separate from the tying product "to identify a distinct product market in which it is efficient to offer" the two separately. *Hyde*, 104 S.Ct. at 1563 (citing approvingly this court's earlier decision in *MBNA* as well as *Siegel*). *See also Digidyne*, 734 F.2d at 1339.[12]

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[12] Defendant argues that *Siegel* is an "odd-ball" case that is a singular exception to the rule established in the franchise/trademark cases. *Siegel* cannot be dismissed so easily. The Supreme Court saw fit to treat *Siegel* approvingly in *Hyde* when the Court included it in an enumeration of cases consistent with its two-product analysis. 104 S.Ct. at 1563 n. 35. The tied products in that case were clearly not central to the purpose for which the franchise had been established, and thus were part

It remains undisputed in this action that "MBNA has separate personnel and price lists for new car and replacement part sales," and that "[m]any replacement (as well as original) parts are manufactured by outside suppliers." *MBNA*, 517 F.Supp. at 1380. It is also clear that there is a demand for Mercedes replacement parts separate from the demand for the Mercedes Benz passenger car itself. This court therefore finds, for a second time, that the Mercedes-Benz automobile and its replacement parts are separate products.

2. Products Tied Together

No tying arrangement exists, however, unless it is also demonstrated that the purchase of the tying product is conditioned on the purchase of the tied product. In *MBNA*, this court determined that the "express wording of the Dealer Agreement" tied the purchase of Mercedes-Benz passenger cars to the purchase of MBNA-supplied replacement parts. 517 F.Supp. at 1381-84. It so concludes again now.

Defendant previously argued that notwithstanding the language of Paragraph 9C of the Dealer Agreement, the understood practice is that "dealers are free to purchase non-Mercedes-Benz parts and that [this] evidence of the parties' understanding should be controlling." *Id.* at 1381. Defendant repeats that argument here, with the additional contention that two other provisions of the Dealer Agreement, taken together with Paragraph 9C, demonstrates the lack of a tie between the Mercedes-Benz automobile and its replacement parts.

Paragraph 9D of the Dealer Agreement provides:

> Dealer shall not represent as new, genuine MB parts or as parts approved by DBAG any parts used by it in the repair or servicing of MB passenger cars, which are not in fact new, genuine MB parts or parts expressly approved by DBAG or MBNA.

Paragraph 13F of the Agreement provides:[13]

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of an illegal tie-in. The replacement parts at issue in this case are also not central to the purpose of the Mercedes franchise. If other elements are demonstrated, they also may be shown to be part of an illegal tie.

[13] This provision was added to the Agreement in 1983.

> If Dealer sells for use in the repair of any MB Product any parts which are not genuine MB Parts or parts expressly approved by DBAG or MBNA, Dealer will advise the purchaser by appropriate written notice on the Invoice that such parts are not genuine MB Parts supplied by MBNA and are not warranted by MBNA. Dealer will also, by appropriate written notice on the Invoice, advise the purchaser of the source of such parts and of the warranty, if any, given by the supplier of such parts.

According to defendant, since Paragraph 9D provides for disclosure by the dealer of the use or sale of any non-MBNA parts, "[i]f Paragraph 9C compelled exclusive dealing with MBNA, Paragraph 9D would be to no purpose at all." (Def.'s Brief Supp.Summ.Judgment, at 14). Moreover, MBNA continues, the basic, "implicit" purpose of Paragraphs 9C and 9D is to provide for "full and conspicuous disclosure"; Paragraph 13F is the "explicit" declaration of that purpose. *See, id.* And, in any event, continues defendant, 9C is, in practice, irrelevant, since "dealers interpret [it] (as well as the other provisions of the Agreement) in various ways, or they simply ignore it. Some do not know of it; others interpret it as going only to 'safety related' parts; all feel free to overlook it." *Id.* at 15. In sum, contends MBNA, all 9C does is require dealers to "buy some MBNA parts as a condition of the privilege to display the trademark." *Id.*

None of these arguments is sufficient to convince this court to alter its previous determination of this question. Notwithstanding any other provision of the Agreement, Paragraph 9C clearly forbids the use or sale of non-genuine or unapproved replacement parts "if such parts are necessary to the mechanical operation of such MB passenger cars." That has nothing to do with "full and conspicuous disclosure"; it clearly prohibits dealers from using or selling certain equipment.

It is also clear that these three provisions deal with different types of replacement parts. While Paragraph 9C pertains only to parts "necessary to the mechanical operation" of the car, Paragraphs 9D and 13F, which do not contain this limiting language, clearly pertain only to those non-genuine parts that 9C does not prohibit dealers from using. Thus, Paragraph 9C cannot

be read into superfluity or given interpretations its language will not bear, as defendant would wish; if it had no purpose, it would not be in the Agreement.[14]

Defendant's further attempt to scuttle 9C by arguing that the dealers either interpreted it to suit their own purposes or ignored it entirely is also without merit. Even if the dealers did feel free to ignore the provision—and there is substantial evidence to the contrary—the fact of the existence of tying language is enough to evidence a tie. As this court previously noted, such language by itself has considerable "coercive potential," and evidence that it was actually enforced is not necessary to show a tie-in unless "the contract itself does not demonstrate a formal tying agreement." *MBNA*, 517 F.Supp. at 1381-82 and n.17; *see also Northern Pacific Ry. Co., supra*, 356 U.S. at 11-12, 78 S.Ct. at 521-522; *Ungar v. Dunkin' Donuts of America, Inc., supra*, 531 F.2d at 1224. Since Paragraph 9C clearly does contain tying language, the fact that some dealers may have ignored it does not defeat the existence of a tie.

The fact that Paragraph 9C applies only to those parts "necessary to the mechanical operation" of the car also does not defeat the existence of a tie. In *MBNA*, this court noted that this language was ambiguous, rendering it impossible for the dealers to know what parts were covered in the proscription. There was also considerable evidence suggesting that the phrase referred, in practice, to virtually the entire automobile. *Id* at 1382 and nn. 18-19.[15] These factors led the court to conclude that the limiting language did not alter the explicit tying arrangement the provision imposes, and it sees no reason to change that determination now.

It is true that Paragraph 9C permits the use of outside parts if they have been "expressly approved" by DBAG. As this court has

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[14] The fact that MBNA earlier considered and then rejected a less restrictive version of Paragraph 9C indicates that the provision was not intended to be without effect. *See*, "Business Justification" section, *supra*.

[15] MBNA officials still appear to consider parts "necessary to the mechanical operation" of the Mercedes car to include virtually the entire car. *E.g.* (Stoehr Dep. at 249-54, Pl.'s App. II).

noted, the existence of an illegal tie-in may in fact be defeated if an actual "approved source" clause and approval mechanism exist. *Id.* at 1382-83. The court determined, however, that no such procedures were available to Mercedes dealers, and the hint in 9C at some possible approval mechanism was therefore illusory. *Id.* at 1383-84. The court has been given no reason to find otherwise now.

For the foregoing reasons, the court is constrained to conclude, for a second time, that the Mercedes-Benz automobile and its replacement parts are separate products tied together by Paragraph 9C of the MBNA Dealer Agreement.[16]

B. Sufficient Economic Power

The second factor in determining the existence of a per se illegal tying arrangement is whether "the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market." *Hyde*, 104 S.Ct. at 1559. The use of a per se standard is, indeed, appropriate only if "the existence of forcing is probable," i.e., there exists a "substantial potential for impact on competition" resulting from the economic power of the seller. *Id.* at 1560. This standard can be met if the plaintiff makes one of the following showings:

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[16] Defendant argues that since plaintiff in its damage study admits that BMW imposed no tying arrangement on its dealers, and BMW has in its dealer agreement a provision similar to Paragraph 9C, plaintiff in effect admits that MBNA is not acting in restraint of trade. (Def.'s Brief Supp.Summ.Judgment, at 4, 12, 13, 23, 24, 37). This argument misconstrues the import of the damage study and plaintiff's use of it.

The damage study deals specifically with impact, something that is not at issue in this proceeding. The study took as an assumption the belief of the former officers of Eurasian Automotive Parts that "[w]hereas MBNA was coercing the Mercedes-Benz dealers to eliminate outside purchases, and insisting that the dealers had agreed not to buy except from MBNA and that they honor their agreement 'or else,' BMW employees were not coercing the BMW dealers." (Pl.'s Brief Opp.Summ.Judgment, at 30-31). The provision in the BMW agreement is thus of no import in analyzing whether MBNA's products are tied together.

1. The seller has a "high" share of the tying product market, *id.*;

2. The tying product is a unique product that the seller's competitors are not able to offer, *id.* at 1560-61;

3. A substantial number of consumers have accepted the tie-in and no factor other than the economic power of the seller explains that acceptance. *MBNA*, 517 F.Supp. at 1384; *see also, Hyde*, 104 S.Ct. at 1561 n. 26 (quoting *Northern Pacific Ry.*, 356 U.S. at 7-8, 78 S.Ct. at 519-520).

Plaintiff bases its argument primarily on the second, or "uniqueness" factor, though it does suggest that the third factor is also met here.[17]

As this court held in *MBNA*, a showing of uniqueness is made by the plaintiff if:

> . . . it can show that the alleged tying product, the Mercedes-Benz automobile, is sufficiently unique to give defendant a competitive advantage in the tying product market. If the tying product is sufficiently desirable to consumers or is a product not easily replicated or commonly available, then the producer of the tying product is likely to have sufficient leverage to restrain the tied product market.

517 F.Supp. at 1385-86 (citations omitted). Some courts have held that this demonstration can be made when a seller has economic power by virtue of a patent or a copyright in the tying product. *See, e.g., United States v. Loew's, Inc.*, 371 U.S. 38, 45-46, 83 S.Ct. 97, 102-103, 9 L.Ed.2d 11 (1962). In *Northern Pacific Ry.*, the Court held that the railroads' vast land holdings gave it a unique bargaining position sufficient to establish the requisite economic power. 356 U.S. at 7-8, 78 S.Ct. at 519-520. Although the ownership of a trademark "is not conclusive of economic power," *MBNA*, 517 F.Supp. at 1386, some courts have

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[17] Plaintiff also attempts to argue that the market dominance test is also met here, since the market for the tying product, the Mercedes-Benz passenger car, consists of the Mercedes dealers. (Pl.'s Reply Brief, at 22-23). This argument misconstrues the nature of the market dominance test. *See, Digidyne*, 734 F.2d at 1336, 1340 (9th Cir.1984).

held that a franchisor's trademark control over a common product confers sufficient economic power to establish a tie. *E.g., Siegel v. Chicken Delight*, 448 F.2d at 49-50.

Mozart contends that such factors as the special advantages a Mercedes dealer enjoys and the alleged technological superiority and immense prestige of the Mercedes-Benz passenger car make this automobile and the opportunity to distribute it so uniquely valuable that its producer has power to "force" the dealers to purchase the tied product, MBNA replacement parts.[18] Defendant contends that none of this is sufficient to demonstrate uniqueness for the purpose of establishing economic power on the part of MBNA. Relying primarily on *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977) ("*Fortner II*"), MBNA argues that its product is not unique "in the antitrust sense" because Mozart has not shown that it confers on the manufacturer "something approaching the insulation of a patent or a copyright." (Def.'s Brief Supp.Summ.Judgment, at 40). The proper focus in this inquiry, contends defendant, is not the self-laudatory comments of MBNA officials, or the praises heaped upon the Mercedes-Benz passenger car by satisfied customers or automobile critics, but is rather the capacities of MBNA's competitors. Unless it can be shown that they are somehow prevented from marketing products comparable to those offered by MBNA, continues defendant, Mercedes products are not sufficiently unique to give MBNA economic power over the tying product market. *Id.*

Defendant appears to read *Fortner II* to require a producer to have something approaching a monopoly in the tying product market in order for its product to be unique. MBNA made this argument in the previous action before this court; it was rejected then, *MBNA*, 517 F.Supp. at 1386, and must be again now. *Fortner II* does contain language indicating that "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product," 429 U.S. at 620, 97

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[18] Plaintiff bases this argument on portions of the extensive deposition and documentary evidence generated by this litigation, mostly on the deposition testimony of MBNA officials. *See*, (Pl.'s Mem.Supp.Summ.Judgment, at 12-24).

S.Ct. at 867, and that the producer's competitors must be "in some way prevented from offering the distinctive product themselves." *Id.* at 621, 97 S.Ct. at 868 (quoting *Fortner I*, 394 U.S. at 505, 89 S.Ct. at 1259). The Court's opinion made it clear, however, that this reasoning did not impose a monopoly requirement, and that the uniqueness showing could be made "[w]henever there are some buyers who find a seller's product uniquely attractive, and are therefore willing to pay a premium above the price for the nearest substitute . . . " *Id.* 429 U.S. at 621 n. 14, 97 S.Ct. at 868 n. 14 (quoting Note, *The Logic of Foreclosure: Tie-In Doctrine after Fortner v. U.S. Steel*, 79 Yale L.J. 86, 93-94 (1969)). As the court in *Digidyne* noted:

> The concern is not with the restraint on competition in the tying product but on competition in the market for the tied product. What is required is not monopoly power in the tying product market, but only sufficient power to enable the seller to restrict competition in the tied product. If a seller's product is distinctive, not available from other sources, and sufficiently attractive to some buyers to enable the seller by tying arrangements to foreclose a part of the market for a tied product, the adverse impact on competition in the tied product is not diminished by the fact that other sellers may be selling products similar to the tying product.

734 F.2d at 1345. Thus, the plaintiff in that case was able to demonstrate economic power by showing that defendant's software package, arguably the best available and protected by copyright, was sufficiently unique to allow defendant to "force" purchasers of that product to also purchase other materials. *Id.* at 1340-42. This economic power, based on uniqueness, was further enhanced, in the court's view, by the fact that many of the defendant's customers had become, by virtue of their economic investment, "locked in" to the use of the tying product. *Id.* at 1342-43.

Such a strong showing has not been made by plaintiff in this case. This court previously noted that "the Mercedes-Benz passenger car is one of the world's finest automobiles and that the Mercedes-Benz trademark, a three-pointed star in a circle, is recognized worldwide for its representation of automotive luxury,

performance and technology." *MBNA*, 517 F.Supp. at 1373. Plaintiff's impressive array of evidence reinforces these impressions, but does little else. A prestigious and desirable trademark can be persuasive evidence of economic power, *id.* at 1387, but this court is unwilling to determine, as a matter of law, that the prestige of the Mercedes-Benz trademark, taken together with the evidence of the product's technological, safety and luxury preeminence, bestows on MBNA sufficient economic power to force its dealers to accept an illegal tie-in. All of this evidence should be heard and evaluated by a fact-finder at trial before a conclusive determination regarding uniqueness is made.

Mozart also argues, however, that MBNA's economic power is demonstrated by the fact that no explanation other than defendant's ability to impose a tie-in could account for the acceptance of the burdensome terms of Paragraph 9C by the Mercedes dealers. Plaintiff contends that the dealers continued to purchase replacement parts from MBNA, despite the fact that independent distributors offered equivalent parts for much less, because they feared that their two-year franchise agreements would not be renewed if they did otherwise. (Pl.'s Mem.Supp.Summ.Judgment, at 24-27).

In order to make such a demonstration of economic power, plaintiff must show that a significant number of customers in the market have accepted the tie-in, and that there are no explanations other than MBNA's economic power for that acceptance. *MBNA*, 517 F.Supp. at 1385. Mozart falls slightly short on both of these counts. As in *MBNA*, plaintiff has defined the universe of potential buyers as all Mercedes-Benz dealers, and alleges that since 100% of them accepted the adverse terms, a significant number of customers accepted the tie-in. *See, id.* Again, "there is no identified population against which to compare the 400 Mercedes dealers. Plaintiff might argue that 400 represents an appreciable number of buyers from a total population of import car dealers or of import luxury car dealers. Plaintiff has not attempted such a showing." *Id.*

Plaintiff also has not demonstrated that fear of nonrenewal of franchises is the only possible explanation for the dealers' purchase of parts from MBNA. Indeed, some dealers suggest that

the "spectre of non-renewal" did not haunt them at all, and that they had other reasons for purchasing parts directly from Mercedes.[19]

At least one court has determined that since an automobile manufacturer was able to impose burdensome terms on "a significant number of buyers, *i.e.*, its dealers," the manufacturer had sufficient economic power to impose an illegal tie. *Grappone, Inc. v. Subaru of New England, Inc.*, 534 F.Supp. at 1282, 1290 and n. 21. This finding was made, however, after a trial enabled the fact-finder to fully hear and evaluate the evidence. The same procedure must occur in this case. This court therefore declines to conclude, as a matter of law, that MBNA had sufficient economic power to impose an illegal tying arrangement on its franchised dealers.

The court makes that conclusion even though there is considerable evidence that dealers were coerced into the purchase of replacement parts from MBNA. The evidence plaintiff uses to demonstrate the fact of coercion consists primarily of letters, deposition testimony, and MBNA Visitor Reports, which were filled out by MBNA field representatives after inspection tours of Mercedes-Benz dealerships. This evidence seems to indicate that at least some Mercedes dealers or their parts employees felt coerced into buying only genuine MBNA parts, if only "safety-related" parts. Parts managers talk of being harassed by MBNA parts representatives regarding the purchase of outside replacement parts, and some evidence points to possible sanctions imposed against one dealer for his failure to abide by the company policy regarding outside purchases. Defendant's evidence essentially consists of eleven volumes of deposition testimony from numerous Mercedes dealers from around the country who say they have never felt threatened or coerced into buying replacement parts solely from MBNA. Although there is surely enough evidence here to satisfy the "modicum of coercion" requirement, this court nevertheless declines to decide the issue of economic power on summary judgment.

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[19] *See* (Terian Dep., Def.'s App. IX, at 1313-15).

C. Effect on Interstate Commerce

In the previous action before this court, it was determined, as a matter of law, that a not insubstantial amount of interstate commerce was affected by the alleged tying arrangement. *MBNA*, 517 F.Supp. at 1387-88. The court has been given no reason to change its previous finding, and therefore concludes, for a second time, that a sufficient amount of commerce was involved in this arrangement to satisfy this element of the per se analysis.

The court has thus far concluded that the per se tying standard applies in this case. It has also been determined, as a matter of law, that (1) the Mercedes-Benz passenger car and its replacement parts are separate parts tied together by Paragraph 9C of the Dealer Agreement, and (2) that the tie affects a not insubstantial amount of interstate commerce. The court has also determined that the issue of economic power must be decided at trial.[20]

IV. Business Justification

As this court has noted, a defendant can excuse itself from an otherwise per se illegal tying arrangement if it can demonstrate the existence of a business justification. *Id.* at 1388. The defendant bears the burden of proving that justification. *Id.*

MBNA maintains that the arrangement at issue in this case is necessary to make sure that the customer "will get the real thing" in terms of new cars, service, and repairs, and is essential to protecting the quality of the Mercedes-Benz passenger car and the goodwill of the customer. (Def.'s Brief Supp.Summ.Judgment, at 1-9). Mozart contends that, on the contrary, MBNA is without business justification for the tying arrangement for two reasons: 1) a less restrictive alternative that would maintain the quality of replacement parts is available to Mercedes; and 2) in any event, the quality control argument MBNA makes is without

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[20] Defendant also makes much of the argument that a private plaintiff, as opposed to the government, is somehow required, even in a per se case, to prove the entire case, including damages, in order to prevail on any point, and cannot therefore move for partial summary judgment. This argument is without substance. Relevant authority makes it clear that the per se standard is not different for private and government suits. *E.g.*, *Hyde*, 104 S.Ct. at 1556-61; *Digidyne*, 734 F.2d at 1338, 1339.

merit, since replacement parts of appropriate design and quality are available from other sources. (Pl.'s Mem.Supp.Summ.Judgment, at 27-35).

Plaintiff's first contention is based on the fact that in drafting Paragraph 9C of the Dealer Agreement MBNA first considered, then rejected, the following version:

> Dealer shall not use, sell, or offer to sell parts other than genuine MB parts or parts expressly approved by DBAG or DBNA if such parts are
>
> (a) necessary to the mechanical operation of Mercedes-Benz passenger cars; and
>
> (b) not equivalent in quality and design to genuine MB parts expressly approved by DBAG or DBNA.

Id. at 29 (quoting Armstrong *TLC* Dep.Exh. P-12, at 18-19, Pl.'s App. IV). This version, alleges Mozart, would have addressed MBNA's concerns regarding quality without conferring on Mercedes an "uncontrolled silent veto" with respect to outside parts. *Id.* at 29-30.

Moreover, plaintiff contends, MBNA does not, in any event, have a quality control problem. MBNA purchases 80% of its replacement parts from DBAG; of those parts, one-half are manufactured by DBAG, and one-half are purchased by Daimler-Benz from original equipment manufacturers ("OEMs"), who produce the parts according to DBAG manufacturing and quality control specifications. A selection of the OEM parts are subjected to a "second round" of tests by DBAG, even though they have already been tested by their manufacturer. *MBNA*, 517 F.Supp. at 1389. The remaining 20% of the replacement parts purchased by MBNA come directly from OEMs who "have met DBAG's standards for the quality of their parts and inspection procedures." *Id.* at 1389 n. 32. Mozart, citing deposition and declaration evidence, alleges that "almost all" of the replacement parts sold by Eurasian Automotive Products were manufactured by these OEMs, that Mercedes officials knew this, and that independent distributors even offered parts purchased directly from DBAG parts outlets. (Pl.'s Mem.Supp.Summ.Judgment, at 31-33). Moreover, contends plaintiff, MBNA officials had never heard of accidents caused by defective parts sold by independent distribu-

tors, and had indeed heard of no defective part sold by those distributors. In fact, according to Mozart, Eurasian had a better record with warranty claims than Mercedes, who has needed to have many "recall campaigns." *Id.* at 33-35. In sum, Mozart asserts that MBNA's quality control justification lacks merit because the parts marketed by Eurasian were, in fact, of the same quality as many of those used, and even marketed by DBAG and MBNA.

In response, Mercedes claims that its legitimate business objective "is to wed the customer to [the Mercedes-Benz] brand of automobile" and "to keep the car in first class running order." Citing authority used unsuccessfully in its attempt to remove the case from the purview of the per se standard and place it within the parameters of the franchise/trademark cases, MBNA argues that the business of affording the customer "reliable service and quality replacement parts" is an "inseparable aspect of the business of selling new cars" and "vital to good will and competitiveness." (Def.'s Brief Supp.Summ.Judgment, at 1-6). Since, according to defendant, MBNA has no direct control over the quality and design testing of the OEMs and other manufacturers of replacement parts, and indeed could not have such control, it has no assurance that those parts are of the requisite quality and has a legitimate fear of inferior parts coming from those sources. *Id.* at 7-9 and n. 2. Defendant also calls into question Mozart's characterization of MBNA's warranty record and recall campaigns, *id.* at 42-44, and, pointing to the allegedly faulty brake disc marketed by Eurasian in 1976, contends that some parts sold by OEMs (apparently those not intended for DBAG, but solely for the wholesale market) and other manufacturers of "copy parts" are often inferior, and "sometimes dangerously inferior in quality," to genuine DBAG parts. *Id.* at 7-9, 19-20. MBNA does admit that 20% of its parts purchases are from OEMs whose parts have not gone through DBAG's rigorous "second test," but suggests that these OEMs were superior to others, that they had never forced its dealers to buy such parts, and that MBNA "is now in the process of establishing a quality control program in the United States that will duplicate what is done in Germany." *Id.* at 45.

· MBNA's argument regarding the distinction between the distribution, servicing and repair of passenger cars and the sale of other consumer goods is not without merit. *See, MBNA*, 517 F.Supp. at 1390. Indeed, this court has noted that MBNA "has an important legitimate interest in protecting its trademarked automobile and public confidence in the quality and safety of the product." *Id.*[21] The crucial question is whether the alleged tying arrangement imposed on Mercedes dealers is necessary to protect that interest. The inquiry can only be resolved in defendant's favor if MBNA can demonstrate that its quality control procedures are necessary to protect the passenger car's quality, and show that replacement parts of appropriate quality are unavailable elsewhere. *Id.*

Plaintiff has presented an impressive array of argument and evidence which strongly suggests that defendant will have great difficulty meeting its burden here. Defendant's only substantial response to that showing, beyond asserting that it has a legitimate interest in the quality of its product, is to cite the declaration of DBAG inspection director Albrecht Köster. (Köster Decl., Def.'s App. XII, at 1803-25). Köster alleges that from 1981 to 1983, numerous shipments from OEMs contained defective parts, *id.* at 1815-18, which, according to MBNA, demonstrates the need for DBAG quality control procedures. Köster also asserts that it would be impossible for DBAG to monitor the quality control

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[21] Plaintiff argues that the Magnusson-Moss Warranty, Federal Trade Commission Act of 1974, 15 U.S.C. §§ 2301 *et seq.*, especially § 2302(c), is "clear demonstration of Congressional intent that tying arrangements cannot be justified on the ground of preserving goodwill." (Pl.'s Reply Brief, at 23). It is not at all clear to the court that this statute, which prohibits a warrantor from conditioning the warranty on the use of a certain product, and is specifically aimed at prohibiting "the implementation of tying arrangements by means of warranties" (Pl.'s Mem.Supp.Summ.Judgment, at 49) (quoting *Harmsco, Inc.*, 41 Fed.Reg. 34,368, 34,369 (1976)), destroys MBNA's interests discussed here. It is true, of course, that a tie cannot be imposed by Mercedes unless it demonstrates that such an arrangement is the only way the safety and quality of its product can be assured. If such an arrangement proves necessary, this statute would not prohibit it. *See, id.*, at 48 (quoting House Report of § 2302(c)).

procedures of the numerous OEMs, thereby rendering it impossible to know for sure whether the outside parts are of the requisite quality. *Id.* at 1823-24. As plaintiff points out, Köster's declaration deals with replacement part difficulties which took place after the time period relevant in this litigation, and his conclusions regarding the possibility of receiving quality parts from elsewhere is also subject to question.[22] MBNA also cites the deposition testimony of parts manager Don Williams, who suggests that, although he does not know "for sure," some OEMs whose parts are rejected by MBNA leave those parts in Mercedes boxes and then sell them to the independent parts distributors, who then sell them to dealers in the same boxes. This, continues Williams, makes it difficult to tell, for warranty and disclosure purposes, whether the part is MBNA-approved or not. (Williams Dep., Def.'s App. I, at 77-78). This testimony is admittedly specultative and is therefore of little probative value.

As the foregoing discussion indicates, defendant has not made a sufficient showing of the need for DBAG quality control procedures or of the unavailability of quality parts from outside sources to prevail on its own motion for summary judgment. The court also declines, however, to grant plaintiff's motion for summary judgment on this issue. There are serious questions of fact in dispute on the business justification defense that preclude a grant of summary judgment for either party.

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[22] Köster suggests that it would be economically infeasible to require DBAG to monitor all the OEMs who sell on the open market. *Id.* at 1823-24. This does not mean, however, that there are not other possible means available to insure the quality of the parts used in the Mercedes car. Perhaps some quality control system could be implemented directly at the dealer level. The fact that the requirement of quality control poses some problems does not excuse MBNA from doing it. Additionally, Köster and MBNA both appear to misread the import of *Volkswagenwerk A.G. v. Bundeskartellamt* (the "Federal Cartel Office"), No. KVR 8/80 (September 11, 1981). The German court merely held that under German law, VW could not be required to monitor the quality control processes of the OEMs. (Def.'s App. XIV, at 2123). Again, this does not dispose of the matter, for there could conceivably be other means of insuring the quality of replacement parts coming from OEMs.

If plaintiff is able to establish the requisite economic power to impose an illegal tying arrangement, MBNA will have the opportunity to "demonstrate the necessity for its quality control procedures and the unavailability of comparable mechanically necessary replacement parts from non-MBNA sources." *MBNA*, 517 F.Supp. at 1390.

V. The Conspiracy and Monopoly Claims

In addition to the claim of a per se illegal tying arrangement, Mozart alleges that MBNA also engaged, with its dealers, in a conspiracy to boycott independent distributors, and also attempted to monopolize, through "resale price maintenance," the sale of Mercedes-Benz replacement parts, in violation of 15 U.S.C. §§ 1 and 2. The court does not find it necessary to discuss in detail the parties' arguments regarding these claims. The main focus of argument and dispute has been the tying allegation, and the court need do no more here than state that it declines plaintiff's invitation to grant summary judgment as to the conspiracy claim on its own motion, and also will not grant defendant's motion for summary judgment on both claims. There is sufficient dispute regarding coercion to permit the conspiracy claim to proceed to trial, and neither party has mustered sufficient argument on the monopoly claim to justify summary judgment treatment.

VI. Conclusion

Based on the foregoing discussion, the court determines that since there are genuine issues of fact regarding the points raised in plaintiff's motion for summary judgment, that motion must be DENIED. Because the per se standard is applicable as to the tying count, and sufficient factual dispute remains as to the conspiracy and monopoly counts, defendant's motion for summary judgment is also DENIED.

As permitted by Fed.R.Civ.P. 54(d), the court finds that there is no substantial controversy as to the following facts:

1. The Mercedes-Benz passenger car and its replacement parts are separate products tied together by the terms of Paragraph 9C of the MBNA Dealer Agreement; and

2. The tying arrangement affects a substantial amount of interstate commerce.

This matter will proceed to trial on the illegal tying arrangement claim on the issues of:

1. Whether MBNA has sufficient economic power to restrain competition in the tied product market; and

2. Whether MBNA has a legitimate business justification for the tying arrangement at issue in this case and on the conspiracy and monopoly claims.

3. On the conspiracy and monopoly claims.

IT IS SO ORDERED.

Appendix C

Not for Publication

United States Court of Appeals
for the Ninth Circuit

Nos. 86-1733, 86-2156
DC# CV-81-0531-MHP

The Mozart Company, a corporation,
Plaintiff-Appellant,

v.

Mercedes-Benz of North America, Inc., a corporation,
Defendant-Appellee.

ORDER

[Filed February 26, 1988]

Before: SNEED, ALARCON, and CANBY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Appendix D

Supreme Court of the United States

No. A-840

Mozart Company,
Applicant,

v.

Mercedes-Benz of North America, Inc.

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for the applicant,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 27, 1988.

/s/ SANDRA D. O'CONNOR
Associate Justice of the Supreme
Court of the United States

Dated this 28th day of April, 1988.

Appendix E

In the United States District Court
For the Northern District of California

No. C-81-0531-MHP

The Mozart Company, a corporation,
Plaintiff,

vs.

Mercedes-Benz of North America, Inc., a corporation,
Defendant.

VERDICT OF THE JURY

[Filed Oct. 24, 1985]

1. Do you find that the defendant violated Section 1 of the Sherman Act by way of a tying arrangement which was unlawful under the *per se* test?

Yes ☑ No ☐

2. Do you find that defendant violated Section 1 of the Sherman Act by way of a tying arrangement which was unlawful under the Rule of Reason test?

Yes ☑ No ☐

If you have answered "Yes" to either question 1 or 2 then answer question 3. If you have answered "No" to both questions 1 and 2 stop here and do not answer any other questions.

3. Do you find that there was a business justification for the conduct which you have found violated Section 1?

Yes ☑ No ☐

If you have answered "Yes" to either question 1 or 2 and "No" to question 3 then answer question 4. If you have answered "Yes" to question 3 stop here and do not answer any other questions.

4. Do you find that Eurasian Automotive Products, Inc. was injured in its business or property by reason of a violation of Section 1 of the Sherman Act on the part of Mercedes-Benz of North America, Inc.?

Yes ☐ No ☐

If you have answered "Yes" to question 4 then answer question 5. If you have answered "No" to question 4 stop here and do not answer question 5.

5. What was the dollar amount, if any, of damages sustained by Eurasian Automotive Products, Inc. by reason of defendant's violation of Section 1 of the Sherman Act?

$ ______________

Dated: 10/24/85

/s/ JOEL P. POWERS
Foreperson

Appendix F

STATUTES INVOLVED

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, as amended, Sections 3 and 4, 15 U.S.C. §§ 14 and 15:

Clayton Act, Sec. 3; 15 U.S.C. § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Clayton Act, Sec. 4; 15 U.S.C. § 15 (as in effect during the period of this case):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, Sections 1 and 2, as amended, 15 U.S.C. §§ 1 and 2:

Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

among the several States, or with foreign nations, is declared to be illegal. . . . "

Section 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . . "

(2)

No. 87-2083

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE MOZART COMPANY,
Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE A. CUMMING, JR.
Counsel of Record

MALCOLM T. DUNGAN
DARRYL L. SNIDER
THOMAS M. PETERSON
Brobeck, Phleger & Harrison
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 442-0900
Attorneys for Respondent

Of Counsel:
ALLAN G. FREUND
WAYNE H. SAMSON
Mercedes-Benz of North America, Inc.
One Mercedes Drive
Montvale, NJ 07645
Telephone: (201) 573-0600

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS RESTATED

1. Is a partial exclusive dealing clause—ancillary to a perfectly lawful product distribution arrangement between respondent and 400 franchised dealers—illegal under Section 1 of the Sherman Act (or any other antitrust law), where:

a. The jury, on instructions prepared by petitioner and given at his request, returned a verdict against petitioner, specifically finding that the exclusive dealing clause protected both consumer expectations and the shared goodwill of the franchisor and all its retail franchisees; and

b. The court of appeals unanimously agreed with the district judge's finding that the verdict against petitioner was supported by substantial and persuasive evidence presented at an eleven-week trial; and

c. Respondent's market share was less than 2%; petitioner offered no theory or evidence suggesting that the exclusive dealing arrangement offends any of the legitimate concerns of present antitrust jurisprudence, and instead proposed a theory of "market power" that the court of appeals saw to be unanchored in economic reality?

2. Is petitioner automatically entitled to an offensive collateral estoppel, *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), where no exercise of *Parklane*-conferred discretion is even challenged, and petitioner's interest in a prior decision (the *Metrix* case) arose only after he had lost a full trial and a plenary appeal?

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STATEMENT OF CORPORATE AFFILIATIONS

Respondent Mercedes-Benz of North America, Inc. ("MBNA") is a Delaware corporation whose ultimate parent is Daimler-Benz AG, the German manufacturer of Mercedes-Benz automobiles, trucks, buses and replacement parts. There is no public holding of or market for the stock of MBNA or any other United States subsidiary or affiliate of Daimler-Benz AG.

Daimler-Benz is an aktiengesellschaft ("share company") organized under the laws of the Federal Republic of Germany. The stock of Daimler-Benz AG is listed and traded on some exchanges in Europe, but is not listed or traded on any exchange (or regularly traded over-the-counter) in the United States.

No. 87-2083

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE MOZART COMPANY,
Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

This antitrust case involves a partial exclusive dealing clause appearing in the franchise agreement between respondent Mercedes-Benz of North America, Inc., ("MBNA") and each of the 400 franchised Mercedes-Benz dealerships through whom Mercedes-Benz automobiles and parts are distributed to the motoring public in the United States. After an eleven-week trial, and upon instructions written by petitioner Mozart, the jury returned a verdict against him. Denying petitioner's motion for judgment NOV, the district court observed that the evidence supporting the verdict was both "substantial" and "persuasive." The court of appeals recognized that the only significant issue was whether substantial evidence supported the jury's determination that MBNA had established a business justification for the challenged restraint. As four federal judges have now determined that this

verdict was proper, further review would be to none of the purposes expressed in Rule 17.

The court of appeals' rejection of petitioner's theory of "market power" (also given to the jury in instructions written by petitioner) confirms that the use of this particular franchise clause was entirely consistent with principles settled in *Jefferson Parish, GTE Sylvania and Fortner II.*[1] In short, the case should never have gone to the jury; but it did, and petitioner lost. His new-found interest in the *Metrix* case avails him nothing; both lower courts, in the careful exercise of the discretion conferred by *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), afforded petitioner a full trial and a plenary appeal. "Offensive collateral estoppel" is not available to one who wishes to escape the consequences of such proceedings. These issues are also fact-bound, and present nothing justifying a writ of certiorari.

STATEMENT OF THE CASE

1. Mercedes-Benz and the American Automobile Market

Mercedes-Benz automobiles and replacement parts are the products of Germany's Daimler-Benz AG, the world's oldest and most distinguished automaker. Today there are twenty-seven domestic and foreign automakers selling passenger cars in the United States. Americans purchased over 10 million new cars in 1987, of which General Motors sold approximately 3.7 million, Ford 2.1 million, Chrysler 1.1 million, Toyota and Honda over 600,000 each, and Mercedes-Benz about 90,000 (less than 1%). All automobiles are retailed in the United States under a franchise system. There are over 25,000 franchised automobile dealerships in the United States, of which only about 400 (less than 2%) are Mercedes-Benz dealerships.[2]

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[1] *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.* 433 U.S. 36 (1977); *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610 (1977).

[2] *Market Data Book Automotive News*, p. 105 (April 1987).

Distribution of Mercedes-Benz products in the United States began in the 1950's, by Studebaker dealers under a distribution agreement between Daimler-Benz and Studebaker. Today, foreign automobiles are an important competitive factor, even though their sales still pale by comparison to those of the domestic manufacturers. But it was not always so, for the 1950's were the heyday of Detroit and " 'Made in America' meant the absolute best in the world," L. Iacocca, *Talking Straight* 249 (1988). Foreign cars in those days were but a handful of European curiosity pieces, and " 'Made in Japan' meant cheap and shoddy. Even the fireworks were lousy." *Id.* at 251.

But this was all to change, for while American firms emphasized short-term return at minimum financial risk, German and later Japanese manufacturers "were emphasizing technical excellence and investing heavily in product quality. These foreign producers realized that they could use quality affirmatively as a competitive weapon and that it would translate directly into higher shares of the American market."[3] The first to do so was Daimler-Benz. Unhappy with Studebaker dealers' inattention to proper servicing and repair of the Mercedes-Benz automobile, Daimler-Benz terminated its arrangement with Studebaker in 1964 and commenced direct distribution through MBNA, a subsidiary created for that purpose. MBNA initially franchised fewer than 200 dealers, each selected as an entrepreneur willing to promote an unfamiliar line of products, and to provide a level of service and repair crucial to the success of high-quality products in the American market. Today, despite its tiny market share, Mercedes-Benz is a pacesetter whose image is reflected in the competitive responses of American automakers, who emphasize quality, value and genuine parts, and those of one Asian manufacturer who flatly claims that its product is "the Mercedes-Benz of

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[3] T. Piraino, *The Case for Presuming the Legality of Quality Motivated Restrictions in Distribution*, 63 *Notre Dame L. Rev.* 1, 20 (1988). Adds Chrysler's Iacocca: "Many companies kidded themselves that their profits would shoot up if they cut corners in quality. Well, plenty of industries, including the American auto industry, found themselves not gaining but losing market share because of shoddy products." L. Iacocca, *supra*, at 252.

small cars." And while Daimler-Benz hardly claims exclusive credit for the quality revolution, its contribution as the pioneer is beyond doubt.

2. The Automotive Franchise System

There are over 25,000 franchised automobile dealerships in the United States, of which only about 400 are Mercedes-Benz dealerships. The automotive franchise system has come to include many universal elements. Automobile franchise agreements generally require dealers to display the franchisor's trademarks, to employ factory-trained technicians, to use the manufacturer's sales materials, and to observe certain business hours. And all of them require dealers to maintain a factory-authorized service department offering genuine parts, a requirement also imposed by the laws of many states. See, generally, *Business Electronics Corp. v. Sharp Electronics Corp.*, ____ U.S. ____, 108 S.Ct. 1515, 1527-28 (1988) (Stevens, J., dissenting).[4]

The dealers and the franchisor expect and intend to convey to the public the message that each dealer is the manufacturer's representative in a particular locality. In each dealer's service department, the manufacturer's trademark is prominently displayed, genuine parts are advertised, and parts and service representatives wear uniforms with trademarks on them. The intention is to convey the message that this is an "authorized dealer" who services and repairs the cars he sells to meet "factory standards" through "factory-trained technicians" using "genuine parts." This message encourages vigorous interbrand competition by nurturing the public image that those who come to the dealer for new cars, service, or repairs will get the real thing. As this Court observed in *GTE Sylvania*:

> "[N]ew manufacturers and manufacturers entering new markets can use [vertical, non-price] restrictions in order to induce competent and aggressive retailers to make the kind

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[4] Parallel citations to advance sheets, and denials of certiorari, appear in the Index of Authorities, *ante*, and are not repeated in textual citations. All emphasis in quoted materials has been added, unless otherwise noted.

of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's good will and the competitiveness of his product. Because of market imperfections such as the so-called 'free rider' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did. Posner, *supra,* n. 13 at 285" (433 U.S. at 55).[5]

Putting it all together, economist George Stigler testified at the trial of this case:

"If I have 3,000 franchises or 400, as in this case, and I let each of them do what he wants, some of them could do what we call free riding. They could cut back on their services, they would be shabby in the maintenance or repair department or something like that or use cheap parts. And the effect would be not only for them to lose business, but for the name of the product to get a bad name so that other people would lose, too, and so that the problem in a franchise system is, on the one hand, to maintain that uniformity of quality that you want to be the insurance and a big factor in selling and, on the other hand, maintain that stimulus on the part of the individual owners of the franchises who work hard and diligently.

"And so you have a set of controls, and every franchise agreement will give the franchisor the right to inspect the

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[5] The Court's citation was to R. Posner, *Antitrust Policy and the Supreme Court: An Analysis of Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 Colum. L. Rev. 282 (1974). He is one of many Chicagoans upon whom aspersions are cast in the Petition.

property, to insist that it has certain things like in the case of an automobile a repair section, a display section, that it keeps records in a certain way so that you know things are done properly. To assure that the mechanics, for example, had gone through a proper training course for the handling of that car.

"And you go down the line, and the maintenance of that quality is the important thing that allows a national system to be decentralized and to get advantages of both a big national planning and standardization and the local entrepeneur, who is living his own life, and if he is doing it right, doing it very well." (RT 26-136 and 137).

For these reasons, each of MBNA's dealers enters into a franchise agreement with MBNA containing many standard provisions, including Paragraph 9C, which reads:

> "Dealer shall neither sell nor offer to sell for use in connection with MB passenger cars nor use in the repair or servicing of MB passenger cars any parts other than genuine MB parts or parts expressly approved by Daimler-Benz if such parts are necessary to the mechanical operation of such MB passenger cars."[6]

The evidence at trial confirmed that Paragraph 9C does not work against the interest of consumers. As would be expected, consumers who took their Mercedes-Benz automobiles to authorized Mercedes-Benz dealers for repairs expected and desired that the dealers would install genuine Mercedes-Benz parts. No evidence even suggested that any consumer who patronized a Mercedes-Benz dealer expected or requested the dealer to use parts supplied by another company. Consumers consciously preferred genuine parts supplied by MBNA and backed by its warranty, and patronized dealers precisely to obtain the real thing. Those

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[6] The district court decided, and the jury was instructed, that this clause precluded dealers from buying mechanically necessary replacement parts for Mercedes-Benz automobiles from sources other than MBNA, even though the evidence was that some "free-riding" dealers cheerfully ignored this "obligation" whenever they pleased.

consumers (if any) who consciously preferred to purchase parts supplied by companies other than Daimler-Benz and MBNA were free to obtain them at the hundreds of independent garages and repair facilities in every metropolitan community, many of which advertise themselves as specialists in the repair of Mercedes-Benz automobiles.[7]

MBNA purchases the great bulk (80%) of its replacement parts from its parent, Daimler-Benz, which manufactures about half the parts used in Mercedes-Benz automobiles. Daimler-Benz purchases the other half from German original equipment manufacturers (OEM's) who undertake to comply with its specifications. But the mere undertaking to comply with specifications is not enough to satisfy Daimler-Benz. All replacement parts manufactured or purchased by Daimler-Benz undergo rigid and exhaustive quality control inspections and procedures. Daimler-Benz removes a predetermined number of parts at random from each shipment of parts and subjects those samples to stringent testing. If a sample part fails the inspection process, the entire shipment is rejected. During the time period at issue in this suit, Daimler-Benz annually rejected an average of more than 40,000 shipments of parts from OEM suppliers for quality reasons. (RT 19-23 to 73). MBNA purchases the remaining 20% of its replacement parts directly from the same German OEM manufacturers that supply parts to Daimler-Benz. Although these parts do not undergo Daimler-Benz's quality control examination in Germany, many are tested by MBNA itself, and others are built to its more exacting specifications, which the OEM's do not follow in producing parts for sale to distributors other than MBNA. (RT 31-13 to 25).[8] And without exception, each part supplied by MBNA was covered by its nationwide consumer warranty.

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[7] *E.g.*, RT 19-93 & 94; 21-86 & 87; 31-156 to 174; 38-38 to 104. Accordingly, petitioner's report of the imminent death of an entire industry (Pet. 7) is greatly exaggerated.

[8] Thus, only noncritical parts such as windshield wiper blades, radios, and batteries are exempt from the rigorous quality control procedures, and these represent less than 5% of the parts sold by MBNA. *Ibid.*

The MBNA franchise system has proven its effectiveness in the marketplace. When originally established in 1965, MBNA sold only 12,000 cars per year, representing one-tenth of one percent (0.1%) of the United States automobile market. MBNA currently sells approximately 90,000 cars annually (0.9%), and the quality related services at its dealers are critical to this success. "The German and Japanese used good service as a primary weapon in their initial competition against U.S. automobile manufacturers. The Americans did not treat their customers with similar respect: The burden of repair, often not very successful repair, seemed to fall on the customer." T. Piraino, *supra*, at 21. It was in this setting that the jury was asked to decide whether MBNA had a valid "business justification" for its exclusive dealing arrangement with dealers, and the jury found that the arrangement was *"the only way the safety and quality of MB cars can be assured."*[9]

3. The Generic Parts Business of John Mozart

Independent jobbers of auto parts have been around a long time, *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7 Cir. 1935), *aff'd mem.*, 299 U.S. 3 (1936). One such firm was "Eurasian," a San Francisco parts jobber owned by John Mozart.[10] Although Mozart specialized in BMW parts, he also sold some parts for Mercedes-Benz automobiles. At trial, Mozart boasted that his parts were "as good as" genuine Mercedes-Benz replacement parts sold by MBNA, but the evidence failed to substantiate this claim. As the court of appeals noted:

> "There was considerable testimony by dealers and employees of MBNA about the inferiority of parts supplied by independent jobbers. Although Mozart introduced evidence to the

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[9] The quoted phrase was the nub of the instruction prepared by petitioner and given at his insistence by the district judge (App. A to Pet., p. A-15 & n. 7). The court of appeals correctly brushed aside petitioner's effort to challenge his own instruction on appeal. *Ibid.*

[10] The nominal petitioner is The Mozart Company, a Cayman Islands corporation owned by John Mozart, to whom he assigned the claims against MBNA before trial. See Pet. 2 n. 1. Accordingly, the real petitioner is Mr. Mozart, and we sometimes refer to petitioner as such.

> contrary, the jury was entitled to make credibility determinations in favor of MBNA. We hold that there was ample evidence to support a finding that the tying arrangement is a legitimate means of maintaining the quality of Mercedes replacement parts supplied by dealers, and thereby protecting the reputation of the MBNA product." (App. A to Pet., p. A-16).

Mozart's own trial testimony exploded the myth of "equal quality." He testified that he knew nothing of the specifications of Daimler-Benz, and neither tested nor otherwise assured even himself that the parts he sold met those specifications. (RT 3-106-107; 38-190).[11] Unable to assure equal quality, Mozart sold parts to dealers by emphasizing the greater profit that could be made by substituting his cheaper parts for those of MBNA, whilst charging consumers the same retail prices (RT 5-55 to 76) Cf., *Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 529-31 (1924); *Krehl v. Baskin Robbins Ice Cream Co.*, 664 F.2d 1348, 1354 n. 15 (9 Cir. 1982); *Klamath Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1289 n. 14 (9 Cir. 1983).

4. Proceedings Below, Before Trial

In 1979, Mozart sold his business for a $6 million gain, but as past profits from the sale of replacement parts for Mercedes-Benz automobiles had not been large, he "decided to try antitrust laws as a means of shifting his losses to someone else." *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1355 (9 Cir. 1976). Mozart complained to the United States Department of Justice, which then sued MBNA on the theory that Paragraph 9C of the dealer agreement was unlawful *per se* under Section 1 of the Sherman Act, 15 U.S.C. § 1. In 1981, the district court denied the government's motion for summary judgment, *United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369, 1384-88 (N.D. Cal. 1981,

[11] The quality of Mozart's parts was made concrete for the jury by evidence that Daimler-Benz had itself tested "reverse-engineered" brake discs sold by Mozart, which not only failed to meet the specifications of Daimler-Benz, but were so poorly designed and manufactured as to be downright dangerous. (RT 20-4 to 46).

Patel, D.J.). After due consideration, the government dismissed the action, advising the court that "tying arrangements of the sort involved in this case do not harm competition by creating market power, but merely allow firms to capture, in a particular way, the value of customer preference for a particular brand or trade name."[12]

Meanwhile, before the government dismissed, three private treble-damage actions by auto parts jobbers were brought against MBNA. The first plaintiff was a New Jersey firm, International Auto Parts ("IAP"), which brought a class action on behalf of all jobbers of replacement parts for Mercedes-Benz automobiles. Next filed was the *Metrix* case in the District of Maryland, discussed in Part III of the opinion of the court of appeals below (App. A to Pet., pp. A-8 through A-11), and in which this Court just recently denied certiorari from an interlocutory ruling of the Fourth Circuit, *Metrix Warehouse, Inc. v. Daimler-Benz AG and MBNA*, 828 F.2d 1033 (4 Cir. 1987), *cert. denied*, 108 S.Ct. 1753 (1988).

When Mozart sued in 1981, MBNA moved to transfer the case to New Jersey for consolidation with IAP's putative class action. Mozart persuaded the district court that transfer would be "inconvenient" for him, but MBNA's motion was denied without prejudice to its renewal in the event that *IAP* moved along. To forestall that possibility, Mozart's counsel wrote the district judge in New Jersey, urging him *not* to certify the *IAP* case as a class action. Mozart's efforts to avoid consolidation were fortunate indeed, for in due course summary judgments were entered in favor of MBNA both in *IAP, Inc. v. Mercedes-Benz of North America, Inc.*, 571 F.Supp. 262 (D.N.J. 1983), and in *Metrix Warehouse, Inc. v. Daimler-Benz AG and Mercedes-Benz of*

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[12] See *United States v. Mercedes-Benz of North America, Inc.*, 547 F.Supp. 399 (N.D. Cal. 1982). The quoted language appears in a Department of Justice release, March 15, 1982, submitted to the district judge on the occasion of the government's decision to dismiss. The release appears in full text as an Appendix to this Brief in Opposition, pp. A-1 to A-2, *post*.

North America, Inc., 1984-1 Trade Cases (CCH) ¶ 65,766 (D.Md. 1983).

In late 1984, however, the prospect of separate trials on both coasts arose again, when Senior Judge Edward Northrop reversed himself, and reinstated Metrix's action against MBNA. *Metrix Warehouse, Inc. v. Daimler Benz AG, et al.*, 1984-2 Trade Cases (CCH) ¶ 66,226 (D.Md. 1984). MBNA then sought consolidation for trial, either in Baltimore or San Francisco, but Mozart again wanted no part of any consolidated trial. Judge Northrop was of the view that the different facts of each case would make a single trial unmanageable, even though Judge Patel in San Francisco believed that she could handle the problem. Thus, when both judges reluctantly concluded that a single trial would not be held, Mozart's counsel crowed that his efforts to resist consolidation might soon bring him the reward of "offensive collateral estoppel." (p. 25, *post*).

Although the jury did return a verdict for Metrix, upon learning that Judge Northrop had ordered a new trial on damages, Judge Patel in San Francisco wisely exercised her discretion in favor of trying the *Mozart* case in full, without partial offensive collateral estoppel.

5. The Full Trial in San Francisco, and the Plenary Appeal

Mozart's case thus went to trial on all issues in San Francisco, beginning in August 1985 and concluding eleven weeks later. And Mozart lost. That is the simple unvarnished truth of the matter, which Mozart has persisted in denying ever since the verdict came in against him. The form of verdict submitted to the jury contained a series of questions. (See App. E to Pet., pp. A-52 through A-53). The first two questions asked the jury to decide whether MBNA had "violated" Section 1 of the Sherman Act "under the per se test," or "under the rule of reason test," respectively, and the jury answered "Yes" to each. As the court of appeals determined, however, the instructions on market power that lead to those "Yes" answers were fatally flawed (App. A to Pet., pp. A-4 through A-8). Accordingly, everything Mozart now

claims for those two answers disappears from the case. Question Three was:

> "Do you find that there was a business justification for the conduct which you have found violated Section 1? . . . If you have answered 'yes' to Question Three, stop here and do not answer any other questions."

The jury answered "Yes" to Question 3, and stopped as it was told. Although Questions One and Two, to which "Yes" answers were given, included the word "violation," the district judge explained in her instructions that this was technically incorrect. Thus:

> "Now, I have used the language in Questions One and Two, 'violation of Section 1.' Technically, there is *no violation* if, in fact, there has been a per se violation or rule of reason violation, but there is a business justification; in other words, that completes the whole analysis. And if you find that there is a business justification that's been established by the defendant, *then there is no violation*." (RT 41-232 & 233).

That is exactly what the jury found, and when the district judge received the verdict, she said:

> "Therefore, there is finally and ultimately *no violation* of Section 1, either under the rule of reason or per se . . . . There was finally *no violation* of Section 1 because there was a business justification." (RT Oct. 29, 1985, p. 4).

This should set to rest the canard that Mozart has been retelling, i.e., that he actually "won" and was deprived of his victory by some wanton and freakish procedure (Pet. 5). As the court of appeals explained, the district judge "untangled matters" by determining, in accordance with her instructions, that the finding of a business justification negated the existence of any "violation" of Section 1. (App. A to Pet., p. A-4). The court of appeals then affirmed the jury's verdict on business justification, held that the "Yes" answers to Questions One and Two were flawed by errors in instructions on "market power," and declined to allow Mozart to recycle his loss, either by reference to other

antitrust laws, or by the device of "offensive collateral estoppel." To each of these matters we now briefly turn.

REASONS FOR DENYING THE WRIT

There is nothing in the present petition which can be taken seriously as a claim to have met the threshold requirements for a writ of certiorari. Petitioner gives lip service to *Jefferson Parish* and *Business Electronics* but his major reliance is upon a misreading of *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949), and upon *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (Cir. 1984), which petitioner—but not the court of appeals—sees as a "conflicting" decision. In short, petitioner's entire submission necessarily depends upon ignoring a whole body of law developed over the last dozen years, refining and giving fresh rationality to antitrust, and especially to the law of vertical non-price restraints. He deserves a hearing only if this Court is prepared to consider overruling *GTE Sylvania* and everything else that has built upon *GTE Sylvania*.

Beyond this, all of petitioner's arguments are bound up in the facts of this case. On "liability," the jury found the facts against him, and on "collateral estoppel," the petition is no more than a plea that this Court substitute its discretion *de novo* for that exercised by both courts below. Thus, Mozart's claim of "conflict" with the decision of the Fourth Circuit in *Metrix* is really no more than a stalking horse for his disagreement with the Ninth Circuit's determination that the cases were quite different in fact and law. (App. A to Pet., pp. A-8 through A-11).

A. The Business Justification Defense Under Section 1 of the Sherman Act

1. Petitioner's Misunderstanding of the Jury's Verdict

Petitioner continues to insist, as he did below, that the jury found that MBNA had "violated" the Sherman Act (Pet. 5). But what petitioner insists never happened. The jury was clearly told by the district court that if it found a business justification for the restraint, "*then there is no violation*." (p. 12, *ante*). And the jury so found, on instructions prepared by petitioner himself and given

at his insistence. After the verdict was returned, the district judge, who had heard eleven weeks of testimony, denied Mozart's motion for judgment NOV with the comment that the verdict for MBNA was supported by "substantial" *and* "persuasive" evidence. (RT Feb. 10, 1986, p. 2). And the court of appeals quite agreed.

In truth, "business justification" is simply another phrase for familiar rule of reason analysis. One who desires a *per se* rule must prove that the challenged practice is a commercial obscenity—a naked restraint without *any* redeeming business virtue. *Broadcast Music, Inc. v. CBS,* 441 U.S. 1, 8, 20 (1979). A plaintiff who invokes the rule of reason must prove that the "business justification" for the arrangement, i.e., its legitimate commercial virtues, are nevertheless outweighed by other considerations, e.g., *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S. 85, 113-120 (1984), *Jefferson Parish, supra,* 466 U.S. at 29-31; *Business Electronics, supra,* 108 S.Ct. at 1519-1525. All the Justices who subscribed to the opinions in *Business Electronics* recognized fundamental principles of antitrust law that the present petition omits. As "business justification" and "reasonableness" are virtually synonymous, it follows that they are part of the entire fabric of antitrust, not only under Section 1, but also under Section 2, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 608-12 (1985). As the court of appeals summed up (App. A to Pet., p. A-12, n. 5):

> "It may seem somewhat anomalous to permit justifications for arrangements that are apparently subject to per se condemnation. However, per se rules are simply examples of presumptions that exist throughout antitrust law, and 'easy labels do not always supply ready answers.' *Broadcast Music, Inc. v. Columbia Broadcasting Sys.,* 441 U.S. 1, 8 (1979). Before applying the per se label we must determine whether the challenged practice is one of those types that is 'plainly anticompetitive' and very likely without 'redeeming virtue.' *Id.* at 9. Allowing the defendant to assert a business justification defense is one way of inquiring into whether the reasons

for the relatively categorical historical condemnation of tie-ins apply to the challenged arrangements."[13]

2. That Toddlin' Town . . . the Trial Testimony of Professors Stigler and Brozen of Chicago

Mozart's *ad hominem* comments about present and former professors of the University of Chicago (Pet. 3, 8, 24) is reminiscent of the petition for rehearing rejected in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 802 F.2d 217, 219 (7 Cir. 1986; Flaum, J., concurring). But even worse, the Petition here is an ill-disguised attack upon the credibility of two trial witnesses, economists George Stigler and Yale Brozen of Chicago. In a way, their testimony sets this case apart from garden-variety antitrust litigation, for the issues of economics were not left to decision on the basis of passages selected from the literature. The economic experts were there; they presented their opinions from the witness stand, were subjected to cross-examination by experienced and pertinacious counsel, and no opinions to the contrary were offered by petitioner. Dr. Stigler provided substance and detail to some of the ideas shared by both law and economics that were adumbrated by this Court in *GTE Sylvania* (pp. 4-6, *ante*). On cross-examination, counsel for petitioner went to the heart of the matter. Employing a question written out in advance so as to include the exact words of petitioner's proposed jury instruction (which the district court later gave), his counsel asked:

> Q [by Mr. Lasky]: And are you qualified to say, do you have any expertise that qualifies you to say whether the tying arrangement was the only way the safety and quality of Mercedes-Benz could be *assured*?

No stranger to major league pitching, Dr. Stigler calmly hit a home run with this exchange:

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[13] More recently, Dr. Betty Bock made the same essential point that business justification is a part of the fabric of all of antitrust. See B. Bock, *Business Judgment in Antitrust: The Role of a Valid Business Rationale in Modern Antitrust Jurisprudence*, 55 Antitrust & Trade Reg. Rep. (BNA) 109 (July 21, 1988), quoted at p. 22, *post*.

"A [by Dr. Stigler]: It seems to me that a method of *insuring*, not requesting the obtaining of good parts by the dealers, invariably required more than merely a statement that the dealers be instructed to buy products of equal quality. . . .[14]

"Q: Doesn't it follow that the dealer would not use inferior parts?

"A: I believe you did not understand my qualification. From the viewpoint of all dealers combined, the maintenance of this high quality product was much to be desired because it was very well justified by consumers' reliance upon and desire for the product. From the viewpoint of any one dealer, the use of cheaper parts and, let's say, higher frequency of repair problems and so forth and so on, would be incurred in part by him—the consequences of that. But many of the consequences would fall on the car's image in general. That's why franchise agreements insist on quality across the board.

"Q: Take dealers as a whole then, a population of dealers. Your answer to my question is that the dealer would not use inferior parts?

"A: If there were no free rider—if all the dealers were one company, I agree with what you said.

"Q: If you get 400 of them?

"A: Then any one has individual interests that conflict with those of a group as a whole . . . The logic is very simple. If any one wheat farmer produces more wheat and that lowers the price for everybody, that has a negligible effect on him, but it has a substantial influence upon all wheat farmers combined; that is, joint actions by everybody together are different from the individual inducement to, say, an individual firm.

[14] As petitioner does not like Chicagoans, we may be forgiven for suggesting that WGN's mellifluous Harry Caray might have called the action in court this way: "Stigler hit it clear into Waveland Avenue. Holy cow!"

"Q: Doesn't it really come to this, Dr. Stigler: Unless you assume the dealers as a whole were rather stupid, no agreement like 9C was necessary to protect the quality of the parts?

"A: I'm sorry we don't communicate better, Mr. Lasky. I have said if all the dealers were unified in one firm, what you say would be exactly true. As long as each is an independent economic organization, any one dealer who, at a substantial saving to himself, could get parts that had higher consequences of damage and the like would be perhaps rewarded for doing so because he would bear only a small portion of the cost, and the general reputation for less reliability would fall on the car in general.

"Q: So what you're really saying is, aren't you, that because there may be the occasional stupid man or the occasional reprobate, that would justify a broad tying agreement that restricts what the dealers can do by contracts; is that what you are saying?

"A: No, sir. These individual interests could be held by people who go to church as often as anyone else. Their self-interest would be to have this problem of the free rider. And that's why every franchise agreement of a national system has a serious concern with the maintenance of quality. It's because the individual inducements are not the same as the aggregate inducements." (RT. 27-18 to 23; colloquy omitted).

Dr. Yale Brozen in his turn brought to bear the experience and insight of one who has spent many years studying the economics of automobile distributors and the franchise system. He testified as an expert (as many dealers echoed intuitively) that consumers demand and expect genuine parts when they bring their cars to a franchised dealer for service and repair; that this choice is made in advance, and is expressed by the very fact of coming to the dealership.[15] And, despite the fact of FTC orders entered decades

[15] See, also, *Klamath Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau, supra*, 701 F.2d at 1289 n. 14.

ago against General Motors, all franchisors require dealers to maintain stocks of "genuine parts" sufficient to meet consumer demand for genuine parts. And Dr. Brozen went on to testify that, in practical effect, the "genuine parts" clauses of GM, Ford, and Chrysler are no different from Paragraph 9C of the Mercedes-Benz Dealer Agreement. This is so because the evidence established beyond peradventure that there was no demand for Mozart's parts by anyone who ever patronized a Mercedes dealership. (RT 38-24 to 117).

3. Less Restrictive Alternatives

Little need be said about petitioner's argument about "less restrictive alternatives." Seizing upon dictum in Justice Frankfurter's 1949 opinion in *Standard Oil, supra,* 337 U.S. at 293, Mozart argues that the only acceptable alternative is "inability" to furnish specifications in the abstract. This effort to stop the clock and arrest the development of antitrust principles at 1949 is the kind of schizoid thinking to which this Court so recently adverted in *Business Electronics, supra,* 108 S.Ct. at 1523-24.[16] Moreover, the remark in *Standard Oil* was made with reference to tying arrangements fastened upon consumers or other end-users, not exclusive dealing arrangements between manufacturer and retailer, and had as its particular reference *International Business Machines Corp. v. United States,* 298 U.S. 131, 139 (1936), where this Court affirmed a finding that specifications were not only published and available, but meticulously followed by all

Here, petitioner's argument is also exploded by uncontradicted expert and lay testimony that the alternative would be valueless unless accompanied by extensive, expensive testing of all parts supposedly manufactured pursuant to the specifications. Pertinent is a conversation between Glendower and Hotspur, recorded in the history of *King Henry IV, First Part*:

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[16] In *GTE Sylvania, supra,* 433 U.S. at 58 n. 29, this Court questioned whether evalution of "alternatives" was even an appropriate part of the analysis of vertical non-price restraints. See R. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,* 45 U. Chi. L. Rev. 1, 10-12 (1977).

"*Glen.* I can call spirits from the vasty deep.

"*Hot.* Why, so can I, or so can any man; but will they come when you do call for them?" (Act III, Sc. 1, 53-55).

One can furnish reams of specifications, but will the Mozarts of this world meticulously follow them? No one can tell without testing the parts to see if they conform to the specifications. As already seen, Mozart did not bother to acquaint himself with any specifications, and took no steps to assure himself, much less his customers, that any specifications had been followed. The elaborate quality control system established by Daimler-Benz is unmatched in the industry, which sets this case poles apart from *In the Matter of General Motors Corp.* 34 F.T.C. 58 (1941). There, GM's exclusive dealing arrangements extended to 30,000 individual dealers *and* independent repair shops. The evidence was that GM and independent jobbers purchased all their parts from the same manufacturers, that the parts purchased by each were "identical in quality and design," and that GM merely repackaged those generic parts in boxes bearing its own trademark. 34 F.T.C. at 81. Here, the evidence was altogether different.

The instructions directed the jury to determine whether various alternatives would nevertheless "assure" that the products were in all respects equal in quality to those of Daimler-Benz and MBNA. Most of Mozart's fancied "alternatives" were not even the subject of evidence, but were placed before the jury in the arguments of his counsel.[17] After the jury rejected all of them, Mozart on appeal thought of a new one, arguing that Daimler-Benz was obligated to provide *gratis* testing and certification of each part that Mozart wished to purchase and resell. Judge Sneed for the Ninth Circuit adequately responded to this by saying:

"We do not believe MBNA was required as a matter of law to take such extreme steps to protect its legitimate interest in

[17] See *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249-50 (3 Cir. 1975) ("Entrepreneurs . . . would be made guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade.").

insuring public confidence in the quality of its trademarked product. There is substantial evidence to support the jury's finding that the only feasible method for maintaining quality control is the use of the tying arrangement." (App. A to Pet., p. A-17).

4. No Conflict Exists Between This Case and Metrix

The evidence presented at trial, and the legal rules given to the jury in instructions prepared by Mozart, were also quite unlike anything in the *Metrix* case.[18] In *Metrix*, the jury was instructed that MBNA could not prevail upon its business justification unless it could prove "that parts of like quality *cannot be produced* because specifications cannot be practically or feasibly provided." (*Metrix* Tr. 4341). That instruction precluded the possibility of any thoughtful and pragmatic consideration by the jury of the distinction between specifications in the abstract and arrangements necessary to *assure* that specifications have been followed. Having decided early on to give that instruction, the district judge in the *Metrix* case was unwilling to allow MBNA to present the kind of evidence of practical reality that was presented at the trial of the *Mozart* case. Since the *Metrix* case was tried first, Mozart's counsel knew of both the prior instruction and its sharp confinement of the evidence at trial, but wanted no part of either. This explains much of his anxiety about collateral estoppel, for having participated in a trial in which a more thoughtful examination of the subject was conducted, both through the evidence and in the instructions, Mozart now wishes to avoid the verdict returned against him.

Just a few months ago, this Court denied certiorari in the *Metrix* case, despite the substantial argument that MBNA had been prejudiced, both by these errors at trial, and especially by the erroneous *post hoc* legal standard on appeal, in which the Fourth Circuit largely ignored the instructions, and affirmed the verdict upon theories and evidence that the jury was never permitted to explore.

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[18] *Metrix Warehouse, Inc. v. Daimler-Benz AG and Mercedes-Benz of North America, Inc.*, 828 F.2d 1033 (4 Cir. 1987), *cert. denied*, 108 S.Ct. 1753 (1988).

As there was no occasion to grant certiorari in *Metrix*, there is even less reason to do so now. If entrepreneurs must guarantee that the imaginations of lawyers (and judges) cannot conjure up less restrictive alternatives, *American Motor Inns, Inc. v. Holiday Inns, Inc., supra,* 521 F.2d at 1249, they should at least be given an opportunity to do so before the jury. The "conflict" (if any) is not between the decisions of the Fourth and Ninth Circuits, but between the jury's resolution of the facts here, and the Fourth Circuit's suppositions as to what a jury in the *Metrix* case might have found on a different record.

As well, *Metrix* is far from final. A new trial on damages has been ordered, and the Fourth Circuit has yet to review the "market power" instructions which were largely the same as those given but disapproved here. When the case returns to the Fourth Circuit after trial, that court will doubtless examine the entire case with the benefit of the views expressed by the Ninth Circuit here. If at that time any "conflict" exists, this Court can resolve it as need be.

B. The Claims Under Section 2 of the Sherman Act and Section 3 of the Clayton Act

Petitioner's assertion that "business justification" is unknown to the law of monopolization (Pet. 18) borders on the frivolous. The court of appeals properly dispensed with this implausible assertion in four sentences. It would be a contradiction in terms to reach the conclusion (as the jury did) that the arrangement was "the only way the safety and quality of MBNA's products can be assured," and simultaneously brand the contractual provision as a tool of monopolization. Curiously, petitioner does not even cite *Aspen Skiing, supra,* where only two terms ago, this Court devoted many pages to the subject of "*Ski Co.'s Business Justification*" as a defense to the charge of monopolization. (472 U.S. at 608-12).[19]

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[19] The petition's omission of reference to *Aspen Skiing* calls to mind the observation of Sir Walter Scott about a London playbill "which is said to have announced the tragedy of Hamlet, the character of the Prince of Denmark being left out." W. Scott, *The Talisman,* intro (1825).

With perfect consistency, other courts of appeals likewise view business justification as a defense under Section 2 of the Sherman Act (15 U.S.C. § 2), e.g., *Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225, 1231 (3 Cir. 1988); *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1185 (5 Cir. 1988); *Olympia Equipment Leasing Co. v Western Union Telegraph Co.*, 797 F.2d 370 (7 Cir. 1986). As Dr. Betty Bock recently observed:

> "In each of the monopoly cases, the courts found that the existence of a *valid business rationale* for allegedly monopolistic practices prevented the charge from holding. . . . When looking at the modern 'valid business justification' language, it is difficult to tell whether the courts are developing a new concept or are simply working out the implications of earlier concepts. I think the latter, because although the shift in explicit judicial focus has been sudden, dating from the *Aspen* and *Matsushita* decisions in 1985 and 1986, the underlying logic has been building since shortly after World War II, sometimes as dicta and sometimes as substance, in a series of major Supreme Court decisions. . . . [A] monopolization defense couched in valid business-reasons terms is, in my view, bottomed on the exceptions spelled out in *Alcoa* and carried forward in *Grinnell* suggesting that an enterprise that has displayed competitive vigor and operated efficiently with sound economic reasons for its conduct should not be turned upon when it is successful. It should be found to have been engaged in illegal monopolization only if it has reached and maintained a monopoly position through practices that themselves are prohibited."[20]

And the jury's verdict here was that the practice of MBNA *is not prohibited* by Section 1. Recycling the practice under Section 2 would be to no purpose, as both the trial judge and the court of appeals recognized.

Mozart's attempt to recycle his case under Section 3 of the Clayton Act (15 U.S.C. § 14) is equally unimpressive. Many of the cases he cites arose under that statute, among them *Interna-*

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[20] B. Bock, *supra*, 55 ATRR at 114, 115 (1988), emphasis in original.

tional Business Machines Corp., supra, 298 U.S. at 131;[21] *Pick Mfg. Co. v. General Motors Corp.,* 80 F.2d 641 (7 Cir. 1935), *aff'd mem.,* 299 U.S. 3 (1936); *In the Matter of General Motors Corp.,* 34 F.T.C. 58 (1941); and *Standard Oil, supra,* 337 U.S. at 293.

In *Standard Oil,* this Court was unanimous in holding that the many positive virtues of exclusive dealing arrangements prohibited *per se* condemnation. The Justices then divided 5-4 over the relative virtues of the arrangement in that particular case, which was imposed by the dominant producer in the marketplace. Even this was too much for Justices Douglas and Jackson, whose dissenting opinions are the precursors of antitrust views developed in and since *GTE Sylvania.* Justice Douglas argued that vertical exclusive dealing arrangements preserve the independence of retailers and blunt the drive of cartels toward forward vertical integration. 337 U.S. at 315. Justice Jackson, the author of *International Salt Co. v. United States,* 332 U.S. 392 (1947), minced few words:

> "The government can derive no comfort for this sort of thing from *International Salt.* There the defendant started with a patent monopoly of the machine for utilization of its product. The customers, canners, were in effect the ultimate consumers of salt as such." 337 U.S. at 324 n. 1.

But where consumer choices are not foreclosed, Justice Jackson correctly observed that an exclusive dealing arrangement cannot possibly work against the interests of consumers, or against any other interest protected by the antitrust laws:

> "Many contracts have the effect of taking a purchaser out of the market for goods he already has bought or contracted to take. But the retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate

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[21] In *IBM,* this Court affirmed the trial court's finding that IBM had not established a business justification for its practice, 298 U.S. at 139. Here, the jury found just the reverse, and the court of appeals affirmed that finding.

consumer—the man in whose automobile the gas is used. It means to me, if I must decide without evidence, that these contracts are an almost necessary means to maintain this all-important competition for consumer business, in which it is admitted competition is keen. The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged." (337 U.S. at 323).

The Court returned to these themes in *GTE Sylvania*. Footnote 26 of that opinion (433 U.S. at 57) captures the essence of Justice Douglas' *Standard Oil* dissent, and the conclusion that non-price vertical restraints promote competition and the interests of consumer welfare gave fresh meaning to the views expressed by Justice Jackson. That is why the proper focus is upon the arrangement's effect—if any—upon consumers. *Jefferson Parish, supra,* 466 U.S. at 18, 24-29; R. Posner, *supra,* 45 U. Chi. L. Rev. at 10-12. It is pure schizophrenia to argue (Pet. 11-12) that in Section 1, Congress intended to protect consumer welfare, but in Section 3 it did not.

C. Offensive Collateral Estoppel

Nearly a decade ago, this Court crisply guided federal courts in their use of offensive collateral estoppel, *Parklane Hosiery Co. v. Shore, supra,* 439 U.S. at 331:

> "We have concluded that the preferable approach for dealing with these problems of offensive collateral estoppel in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."

Mozart had an eleven-week jury trial and lost. In the exercise of discretion, the district court preferred a full trial. Now, Mozart asks to be relieved of the jury's verdict against him based upon a partial, interlocutory adjudication against MBNA on the issue of business justification as it arose in the *Metrix* case.

With only fleeting reference to *Parklane,* petitioner heaps up *defensive* estoppel cases as if they conferred some automatic right to *offensive* estoppel. But *Parklane* strikes a different balance,

confining offensive use of the doctrine to those few instances in which, as a matter of sound discretion, further proceedings would be an unconscionable waste of judicial resources. Certiorari is reserved for better purposes than to revisit discretion twice exercised below.

In *Parklane*, this Court identified several specific situations in which the "general rule . . . should not allow the use of offensive collateral estoppel," and each is present here. They are (1) "where a plaintiff could easily have joined in the earlier action," or (2) where "the judgment relied upon . . . is itself inconsistent with one or more previous judgments in favor of the defendant," or (3) where "for other reasons, the application of offensive collateral estoppel would be unfair to the defendant." 439 U.S. at 330-31.

For reasons satisfactory to himself, petitioner fought consolidation of the *Metrix* and *Mozart* cases for trial, whether in Baltimore or in San Francisco, and persisted in demanding separate trials even when MBNA offered to defray some of Mozart's expenses of trying his case with Metrix in Baltimore. His counsel told the district court that consolidation with *Metrix* would have only "superficial appeal," and that "I don't believe it to be true that there is a great overlap of witnesses."[22] Then, having defeated consolidation with the result that Metrix was to be tried before his own case, petitioner's counsel smugly proclaimed:

> "MR. LASKY: If a verdict comes in for the [Metrix] plaintiff on that case on the liability, these people are out on collateral estoppel. . . ."[23]

There is more. Mozart wrote the jury instructions given to his jury on the issue—business justification—as to which he now claims collateral estoppel. These instructions varied materially from those given in *Metrix*. Mozart tried his case on the different theory expatiated in his instructions. He examined witnesses using

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[22] RT Dec. 14, 1984, p. 68; RT Dec. 19, 1984, p. 3.

[23] RT Dec. 19, 1984, p. 13. Doubtless the same hope explains Mozart's earlier effort to resist consolidation with the *IAP* case in New Jersey (p. 10, *ante*).

the language of his own distinctive jury instructions and theories. When the Ninth Circuit observed that the cases were tried on "different evidentiary facts," it spoke of a difference Mozart created. (App. A to Pet., p. A-11). Having lost on his chosen instructions, Mozart now seeks an offensive collateral estoppel on different instructions which he never requested, but which he knew had been given in *Metrix*. This is not a demand for estoppel based upon identical cases, but a bald demand to jettison a plenary trial and the resulting verdict because petitioner's chosen course of conduct backfired.[24] No decision has ever sanctioned the use of offensive collateral estoppel as a safety net, and to permit petitioner to succeed would be to reward or to encourage the very behavior which gave this Court great pause in *Parklane*:

> "[O]ffensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.' . . . Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by the judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. . . ." (439 U.S. at 329-30).

Still further, the outcome in *Metrix* is the aberration; the lone case in which MBNA did not prevail. That in itself justifies the conclusion that no legitimate purpose would be served by replacing the verdict of Mozart's jury with that of the *Metrix* jury, or by replacing the final determination of the Ninth Circuit with an

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[24] The difference in fact between the *Mozart* and *Metrix* cases is far more significant than Mozart's ridicule of the Ninth Circuit would suggest. The *Metrix* verdict adjudicated liability for 1977 to 1981. Mozart's case related to 1975 to 1979. Mozart's motion for a collateral estoppel never sought a complete judgment of MBNA's antitrust liability, only liability for two years, 1977 to 1979. Mozart's case had to be tried for the years 1975 and 1976, and was, with the verdict for MBNA.

interlocutory decision of the Fourth. *Parklane, supra*, 439 U.S. at 330. Offensive collateral estoppel is both a doctrine of fairness and a tool of sound judicial management. One who loses a plenary trial and a full appeal does not come with very good grace in asking that all the efforts expended at his behest now be vacated in favor of still another trial and another appeal. As the court of appeals astutely noted, "issue preclusion in its affirmative form is not that expansive." (App. A to Pet., p. A-11).

In the end, however, the petition on this score is much ado about nothing. On issues unrelated to business justification—and specifically deferred by the Fourth Circuit for consideration on another day—the Ninth Circuit found that Mozart's jury could not have returned a verdict against MBNA, because of flawed instructions as to "market power." (App. A to Pet., pp. A-6 to A-8). To that subject we now return.

D. Of Digidyne and Intra-Circuit "Conflict"

Petitioner's concluding eulogy to the Ninth Circuit's prior opinion in *Digidyne v. Data General Corp.* (Pet. 24-26)[25] likewise invokes no principle to which Rule 17 is addressed. He begins by misstating MBNA's brief *amicus curiae* in support of the petition for certiorari in *Digidyne* (Pet. 4). What we *actually* said was that while *Digidyne* ultimately rested upon market power presumptions sometimes drawn from copyrights or patents, the opinion's loose language about "uniqueness" was troublesome outside the patent-copyright field. Therefore, we said that it would be unfortunate if this loose language ever spread to the field of franchised distribution of products under a trademark, because "every franchisor offers a package, each a little different from those of others in the field."[26] This Court denied the writ in *Digidyne*, but

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[25] *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9 Cir. 1984), *cert. denied*, 473 U.S. 908 (1985; White, J., with Blackmun, J., dissenting).

[26] See Brief for MBNA as *Amicus Curiae* in *Digidyne* (No. 84-761 in this Court) at page 5. We said in that context that the decision "should be rooted out *before* it spreads to the field of franchised product distribution systems."

the Ninth Circuit understood our concern, *and dealt with it in the very case now at bar.* (App. A to Pet., pp. A-4 through A-8).

On petition for rehearing below, Mozart pitched the *intra-circuit* "conflict" between *Digidyne* and his own case. This impressed no one, least of all Circuit Judge Arthur Alarcon, who participated in both *Digidyne* and in *this* case. He perceived no "conflict," and neither did any other judge of the nation's largest and most diverse circuit, none of whom even asked that a vote be taken on the suggestion of rehearing *en banc.* (App. C to Pet., p. A-50). That should be the end of the matter, for the judges of a single court of appeals are presumed to know how to attend to their own internal affairs. *Wisniewski v. United States,* 353 U.S. 901, 902 (1957). But since petitioner's discussion draws attention to aspects of vertical restraint law other than business justification, a few words of reply are in order.

Mozart's praise of the products and reputation of Mercedes-Benz pleases us immensely, but takes him nowhere. He spent weeks proving the point at trial, but offered no evidence remotely suggesting that other automobile companies "are in some way *prevented* from offering" a comparable product "*if they so elected.*" *United States Steel Corp. v. Fortner Enterprises, Inc.,* 429 U.S. 610, 621-622 (1977).[27] That decision also demonstrates that Mozart's discussion of the "profitability" of dealer sales of Mercedes-Benz automobiles puts him out of court. Profitability (dealer margin between wholesale and resale price) is the cost that a manufacturer incurs to engage dealers to sell its products at retail. "Great dealer profitability" means a *supra-competitive* margin, and hence a sale to the dealer at a wholesale price less than the competitive minimum necessary to retain the dealer's patronage. As Dr. Brozen testified, selling automobiles to dealers at prices below the competitive minimum demonstrates the *absence* of market power, not the reverse. (RT 38-98 to 100).

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[27] With not a little irony, Mozart told the court of appeals that he himself "emphasized the high reputation of the Mercedes car in support of the contention that MBNA had economic power," and that his evidence "*bedazzled*" the jury when it came to decide the question of business justification. (App. Op. Br. below, at p.27).

Selling automobiles at lower-than-competitive prices, along with replacement parts at "higher" prices (if that were the case), and being successful at that endeavor, simply demonstrates that the package is competitively attractive, *Jefferson Parish, supra*, 466 U.S. at 11-12, and is but this industry's equivalent of selling expensive homes through the medium of cheap financing, *Fortner II, supra*, 429 U.S. at 622.

Moreover, as Justice Jackson foretold in his *Standard Oil* dissent, where there is intense inter-brand competition, exclusive dealing agreements with retailers cannot possibly work against consumer welfare or conflict with any other legitimate goal of antitrust. No consumer was ever forced to purchase a genuine Mercedes-Benz part, much less to purchase it under circumstances where the consumer might have preferred to purchase a substitute part from Mozart or anyone else. Any Mercedes-Benz owner who consciously preferred a "Mozart-brand" part was free to obtain it at any of the hundreds of independent automotive repair establishments in every metropolitan community, just as every surgical patient who consciously preferred gas given by Dr. Hyde, rather than by Dr. Roux, was free to undergo the knife at one of the other hospitals in New Orleans. *Jefferson Parish, supra*, 466 U.S. at 24-29. But unlike *Jefferson Parish*, there is no occasion here to speculate about the desires of consumers who patronized Mercedes-Benz dealerships. The evidence established that consumers chose franchised dealership repairs with the expectation and for the reason of obtaining genuine parts supplied and guaranteed by MBNA and Daimler-Benz.

Finally, non-price exclusive dealing arrangements with retailers have no capacity to facilitate "cartelization" or restrict output, *Business Electronics, supra*, 108 S.Ct. at 1520-21; *NCAA v. Board of Regents, supra*, 468 U.S. at 98-104. Arrangements of the kind involved in the present case are ancillary and pro-competitive in the pure sense described by Justice Stevens in his dissenting opinion in *Business Electronics, supra*, 108 S.Ct. at 1527-28:

> "The term 'vertical nonprice restraint,' as used in Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), and similar cases, refers to contractual terms that a dealer must accept in order to qualify for a franchise. Typically, the

> dealer must agree to meet certain standards in its advertising, promotion, product display, and provision of repair and maintenance services in order to protect the good will of the manufacturer's product. . . . Restrictions of that kind, which are a part of, or ancillary to the basic franchise agreement, are perfectly lawful unless 'the rule of reason' is violated. Although vertical nonprice restrictions may have some adverse effect upon competition, so long as they serve the main purpose of a procompetitive distribution agreement, the ancillary restraints may be defended under the rule of reason. And, of course, a dealer who violates such a restraint may properly be terminated by the manufacturer."

Here, the jury addressed the rule of reason under the label "business justification." Although the court of appeals therefore found it unnecessary to speak to all aspects of market power, ancillary restraints, lack of consumer forcing, and the like, its reasoning in affirming the verdict is faultless.

CONCLUSION

This is a fact-bound case that—absent the district judge's misunderstanding of market power and related concepts—would not have reached the jury. But it did, and petitioner lost. The petition for certiorari should be denied.

DATED: San Francisco, California
August 22, 1988.

Respectfully submitted,

George A. Cumming, Jr.
Counsel of Record

Malcolm T. Dungan
Darryl L. Snider
Thomas M. Peterson
Attorneys for Respondent

Of Counsel:
Allan G. Freund
Wayne H. Samson

Appendix

DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE AT
MONDAY, MARCH 15, 1982 202-633-2007

The Department of Justice today dismissed without prejudice a civil antitrust suit against Mercedes-Benz of North America, Inc. (MBNA), of Montvale, New Jersey, the exclusive distributor of Mercedes-Benz automobiles in the United States.

MBNA is a wholly owned subsidiary of Daimler-Benz, A.G., the West German company that manufactures the cars.

The complaint, filed August 15, 1979, in the U.S. District Court in San Francisco, alleged that MBNA conditioned the sale of Mercedes-Benz automobiles to its dealers on the dealers' purchase of replacement parts from MBNA, in violation of Section 1 of the Sherman Act.

Assistant Attorney General William F. Baxter, in charge of the Antitrust Division, said he had concluded, after a thorough review of the case, that the "tying" arrangement involved did not have anti-competitive effects in the luxury passenger car market.

Baxter said that tying arrangements of the sort involved in this case do not harm competition by creating market power. Instead, they merely allow firms to capture, in a particular way, the value of customer preference for the particular brand or trade name, he said.

"Were the arrangement to be prohibited," Baxter said, "the manufacturer could, and probably would, capture the value of that preference in another way—here, perhaps, by increasing the initial purchase price and reducing parts prices, a rearrangement unlikely to yield any economic benefits. To the extent existing market power presents a competitive problem, other sections of the antitrust statutes could be used to attack directly such market power."

Baxter also said pretrial rulings in the case left the government in a posture in which it would have to prove at trial that MBNA

has sufficient market power in the overall market in which the "tying" product, Mercedes-Benz passenger cars, competes, to restrain competition in the "tied" product, replacement parts for those cars.

Also remaining open for trial was the question of whether MBNA has a business justification, namely, quality control, for the tying arrangement.

Litigation of those issues would consume resources of the Department of Justice that can be shifted to other matters far more likely to yield competitive benefits to consumers, Baxter said.

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No. 87-2083

In The

Supreme Court of the United States

October Term, 1987

The Mozart Company, a corporation,
Petitioner,

vs.

Mercedes-Benz of North America, Inc., a corporation,
Respondent.

BRIEF OF AMICUS CURIAE AUTOMOTIVE WAREHOUSE DISTRIBUTOR ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*Basil J. Mezines
David U. Fierst
Stein, Mitchell & Mezines
1800 M Street, N.W.
Washington, D.C. 20036
(202) 737-7777
Attorneys for Amicus Curiae

**Counsel of Record*

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BRIEF OF AMICUS CURIAE AUTOMOTIVE WAREHOUSE DISTRIBUTOR ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Automotive Warehouse Distributors Association ("AWDA") submits this brief *amicus curiae* in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by the petitioner The Mozart Company ("Mozart").

I. Interest of AWDA in Outcome

AWDA is an association whose members are warehouse distributors (WDs) and manufacturers of automotive replacement parts. There are over 500 WD members in AWDA, plus 244 manufacturer affiliates.

The WD members of AWDA are engaged in the business of distributing automotive replacement parts through independent jobbers and franchised automobile dealers. The WDs sell broad

lines of automotive parts, typically including parts for foreign cars. Parts are obtained from the aftermarket divisions of automobile manufacturers (e.g., Ford Motorcraft) or from independent aftermarket manufacturers (e.g., Champion Spark Plug Co.). WDs sell parts to jobbers for resale to service stations, other mechanics and "do-it-yourselfers." They also sell parts to franchised car dealers for use in servicing cars or for resale to consumers.

The majority of the manufacturer affiliates of AWDA are independent aftermarket manufacturers. That is, they are not affiliated with the automobile manufacturers. Many of the manufacturers produce replacement parts which can be used in Mercedes-Benz automobiles. Neither Daimler-Benz Aktiengesellschaft ("DBAG") nor Mercedes-Benz of North America ("MBNA") is a member of AWDA.

The outcome of the present case will have direct and indirect effects on AWDA members. Many of the manufacturer members produce parts for sale to Mercedes-Benz dealers, and many of the WDs sell replacement parts to Mercedes-Benz dealers. As of 1976 over 21% of all replacement parts purchased by Mercedes-Benz dealers for use in repairs or for resale to consumers were produced and sold by independent manufacturers and WDs. The tying arrangement instigated by MBNA, if permitted to continue, would foreclose absolutely all parts sales by AWDA members to Mercedes-Benz dealers.

There would also be indirect effects. MBNA is not the only automobile distributor seeking to prevent dealerships from purchasing replacement parts from independent distributors. For example, a recent decision in the district court in New Hampshire involved an attempt by Subaru of America to tie the sale of its cars to its dealers to purchases of replacement parts. *Grappone, Inc. v. Subaru of New England, Inc.*, 534 F. Supp. 1282 (D.N.H. 1982). The result obtained by MBNA in this case, if not reversed, will make it more inviting for other automobile distributors to impose or enforce similar tying policies. The effect of such tie-ins of cars and replacement parts would, of course, injure the ability of AWDA members to compete for sales to automobile dealers. The cumulative effect

of multiple tying arrangements between manufacturers and dealers would cause widespread injury to AWDA members.

II. Reasons for Granting the Writ

A. MBNA Was Collaterally Estopped from Relitigating Issues Decided in the Metrix Case

The Mozart case was the second in a pair of identical suits challenging the tying arrangement imposed on Mercedes-Benz dealers by MBNA. In the first decision, the jury rejected the business justification defense, and found MBNA's tie-in to be a violation of section 1 of the Sherman Act, 15 U.S.C. § 1. *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft,* 828 F.2d 1033 (4th Cir. 1987), *cert. denied,* ____ U.S. ____ (1988); *Mozart Co. v. Mercedes-Benz of North America, Inc.,* 833 F.2d 1342 (9th Cir. 1987). The outcome in the present case, that the tie-in was protected by the business justification defense, should have been precluded by res judicata and collateral estoppel.

The doctrine of res judicata is that "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981). The related doctrine of collateral estoppel precludes a party in a later action from relitigating issues that were actually litigated and necessary to the outcome of an earlier action, even if the second cause of action is different from the first cause of action. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979). As ruled in Parklane, the party asserting collateral estoppel in the second action need not have been a party in the first cause of action, so long as the party against whom collateral estoppel is asserted, or its privies, was a party to both actions.

The illegality of the MBNA tying agreement and the business justification defense for that agreement were, using the words of Justice Harlan in *Southern Pacific Railway v. United States,* 168 U.S. 1, 48 (1897), "distinctly put in issue and directly determined" in the Fourth Circuit. MBNA should not have been permitted to relitigate the issues of the *Metrix* case in *Mozart.*

The Ninth Circuit's refusal to bar relitigation by MBNA of the business justification defense was not based on any asserted lack of finality in the earlier decision. The court acknowledged that the fact that the Fourth Circuit appellate decision in *Metrix* was subsequent to the district court proceedings in *Mozart* "does not bar any preclusive effect that the *Metrix* case may possess." 833 F.2d at 1348. It concluded that the *Metrix* decision "possesses the requisite element of finality." 833 F.2d at 1348.

The only remaining question to determine whether MBNA could relitigate the business justification defense is whether there was sufficient identity of issues in *Metrix* and *Mozart*. There was. In each case, the same party, MBNA, was sued on the same antitrust issues raised by the same provisions in paragraph 9C of the same written Dealer Agreement. The plaintiff in both cases was a WD alleging the same injury. The identical tying agreement was held to be per se illegal under the Sherman Act by the juries in both cases. In both cases MBNA relied upon the so-called business justification defense. The facts in these two cases could not be more similar:

	Mozart	Metrix
Mercedes-Benz of North America a defendant.	yes	yes
Plaintiff a WD.	yes	yes
Tying agreement in Paragraph 9C of Dealership Franchise Agreement alleged to be illegal under Sherman Anti-Trust Act § 1.	yes	yes
MBNA asserted business justification as a defense.	yes	yes
MBNA offered evidence that tying agreement was necessary to protect good will and protect customer expectation.	yes	yes
Jury finding that the MBNA tying agreement is per se violation of Sherman Act.	yes	yes
Jury finding that there is a business justification for the tying agreement.	yes	no

The juries in both cases found a per se violation. Neither appellate court disturbed that finding. The only issue raised by

the decision in the *Mozart* case is whether Mozart proved a business justification for its otherwise per se violation.

Despite the identity of issues in *Metrix* and *Mozart,* the Ninth Circuit held that MBNA was entitled to relitigate its business justification defense. The Ninth Circuit "start[ed] from the proposition that the case before us is based on different evidentiary facts from those in *Metrix,*" without identifying what those distinguishing facts were. 833 F.2d at 1348. Of course, the fact that MBNA may have chosen to offer different or more persuasive evidence in the second case is no basis for permitting relitigation of an issue already decided adverse to it. *United States v. Stillman,* 167 F.2d 607, 617 (3rd Cir. 1948), *cert. denied,* 335 U.S. 825 (1948).

The only difference between *Metrix* and *Mozart* specifically identified by the Ninth Circuit was that MBNA argued in *Metrix* that *Pick Manufacturing Co. v. General Motors Corp.,* 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam,* 299 U.S. 3 (1936), established an exception to Sherman Act liability for tying arrangements. This argument was unsuccessful, as was MBNA's argument of business justification. In *Mozart,* MBNA relied solely on the business justification defense, without reliance on *Pick.* However, MBNA's decision not to reargue *Pick* does not alter the fact that the business justification defense was argued in full in *Metrix,* and rejected.

Having noted the irrelevant point that MBNA did not raise the *Pick* defense in *Mozart,* the Ninth Circuit rejected collateral estoppel on the untenable basis that the business justification defense was rejected as a factual determination by the jury rather than as a decision of law by the court:

> *Metrix* did not reject the business justification defense; it merely held that in that case the evidence presented by MBNA to make out that defense was not sufficiently strong to support setting aside *a jury verdict that no such defense was established.*

833 F.2d at 1348 (emphasis added). But these are precisely the circumstances under which collateral estoppel should be used. MBNA had its day in court to prove the business justification

defense. It failed. Having been provided a full and fair opportunity to make its case, MBNA should not be permitted a second opportunity to adjust its proof and try to prove the same facts before a new jury. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971). Permitting MBNA to re-argue its case in a Ninth Circuit raises the specter of repeated litigation in the remaining ten circuits.

B. The Decision Was Based Upon an Erroneous Application of the Business Justification Defense

The Ninth Circuit ruled that even assuming a per se violation of the Sherman Act, the tie-in could be permissible if it is imposed for a legitimate purpose and if no less restrictive alternative is available. 833 F.2d at 1349. As noted above, the jury in the *Metrix* case rejected MBNA's proof on these factors, and MBNA should have been estopped from relitigating such issues in this case.

Even if MBNA were not estopped from relitigating the issues settled in *Metrix,* the conclusion that the business justification defense immunizes MBNA's otherwise per se violation is based upon improper jury instructions and inadequate evidence. The instructions that permitted the jury to find a business justification erroneously expanded the justification beyond the bounds necessary to protect the seller's good will.

The relevant portion of the court's instruction was:

> In order to establish its business justification defense, defendant must show that the tying arrangement was necessary to protect the quality of the automobiles, and that replacement parts of appropriate quality are unavailable from sellers other than defendant itself. In other words, defendant cannot prevail on the business justification defense unless it has sustained its burden of proving that its tying arrangement is the only way the safety and quality of MB cars can be assured.

833 F.2d at 1350 n.7. However, maintaining safety and quality is not a legitimate goal that justifies a tie-in unless customers would blame MBNA for low quality replacement parts. If, as

is presupposed by the national policy in favor of competition, customers can recognize that MBNA is not at fault for low quality parts produced by a rival parts manufacturer, then there is no need for a tie-in. The customers will either freely choose the lower quality parts to achieve cost savings or they will willingly pay MBNA a higher price to obtain higher quality parts.[1] Under such a hypothesis, there is no legitimate reason to force Mercedes-Benz dealers to carry only MBNA parts.

If the quality difference between MBNA and other parts exceeds the cost difference, there is no need for the tie-in, because the normal forces of competition will result in the dealers' choosing to buy MBNA parts for resale. Conversely, if the quality difference does not exceed the price difference, the tie-in will necessarily harm competition by requiring dealers, and by extension consumers, to pay more for parts than a competitive market would justify. Under either scenario, the tie-in is not legitimately justified unless a flaw in the market would cause consumers to blame MBNA if a lower priced non-MBNA part fails. The jury instructions, however, failed to address the question whether MBNA has any legitimate fear that it will bear the brunt of low quality parts produced or sold by others.

A finding of a legitimate purpose for the tie-in is only the threshold question. It then must be shown that there is no less restrictive means of achieving that goal. As the Ninth Circuit explained: "To exonerate a franchiser's tie-in quality control technique from the antitrust law, there must be a finding that no less restrictive alternative exists." 833 F.2d at 1349. The Fourth Circuit said in *Metrix:* "An asserted business justification cannot salvage a tying arrangement that is otherwise per se unlawful without proof that means less restrictive than the tie-in were not feasible to achieve the desired protection." 828 F.2d at 1040.

This is precisely the finding that should be precluded by the *Metrix* decision, which squarely rejected the finding that there

[1] Of course, AWDA disputes any assertion that parts produced by a manufacturer other than MBNA would be of lower quality. No such evidence has been offered, or could be. But even assuming the MBNA parts are higher quality, there is no legitimate reason for MBNA to force their sale.

is no less restrictive means for MBNA to protect its good will. Even if the jury were free to find otherwise in *Mozart,* the evidence cannot support such a finding.

The Ninth Circuit recognized that it is rare that a party can prove no less restrictive alternative. 833 F.2d at 1349. However, while acknowledging the dearth of prior cases where a party had met its burden of proof on this issue, the court found a suggestion that the defense should be received with less skepticism than it has previously been accorded. 833 F.2d at 1349. On the contrary, the precedents make it clear that the business justification defense must be limited to the very narrowest of circumstances. *United States v. Jerrold Electronics,* 187 F.Supp. 545 (E.D.Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961). The Ninth Circuit referred to *Jerrold* as "the most notable exception to the general rejection of the quality control defense." 833 F.2d at 1349 n.6.

The *Jerrold* court held that a servicing tie-in for a newly developing antenna system was economically justified because "the limited knowledge and instability of equipment made specifications an impractical, if not impossible alternative." 187 F. Supp. at 560. However, the court went on to point out that "[a]s the circumstances changed and the need for compulsory service contracts disappeared, the economic reasons for exclusively selling complete systems were eliminated." 187 F.Supp. at 560. Thus, although Jerrold had a legitimate purpose and there was no less restrictive means of achieving that purpose, Jerrold nonetheless violated the Sherman Act because it did not remove the restriction sufficiently rapidly when circumstances changed.

The differences between *Jerrold* and *Mozart* or *Metrix* are significant. Unlike the newly forming industry in *Jerrold,* the automotive industry is quite mature and the markets for automotive service and replacement parts are very well-developed. Moreover, there are two additional well-accepted less restrictive means by which MBNA could protect its legitimate interests. First, it could provide specifications for its parts to assure they meet legitimate quality standards. Alternatively, MBNA could simply require its dealers to disclose the origin of parts used in the repair of Mercedes-Benz automobiles.

The Fourth Circuit recognized the first of these alternatives in its discussion of *Standard Oil of California v. United States,* 337 U.S.293, 306 (1949):

> "[t]he only situation ... in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied."

The Fourth Circuit then proceeded to review the evidence produced on MBNA's ability to provide specifications to additional manufacturers and found that "[t]his evidence dispelled the notion that it was not feasible to designate preferred manufacturers and provide them with design specifications." 828 F.2d at 1040. It noted that over half of the fast-moving replacement parts sold by MBNA to dealers are manufactured by other companies on the basis of design specifications provided by Daimler-Benz. 828 F.2d at 1040.

The Ninth Circuit conceded that design specifications for replacement parts were possible: "Mozart is right, of course, when it insists that MBNA could have furnished design specifications for Mercedes replacement parts." 833 F.2d at 1351. But the court rejected this as a viable alternative based upon a series of hypothetical problems. Foremost among the problems were the asserted need to "police" the manufacturers and to "punish" franchisees who use inferior parts. 833 F.2d at 1349. But these problems arise when any franchisor sets quality standards. They have not before been accepted as sufficient grounds to permit an otherwise per se violation of the Sherman Act. Competition itself is sufficient to "police" the manufacturers and to "punish" dealers who use inferior parts.

If MBNA wants to be free from unfair blame for defective, non-MBNA replacement parts they could accomplish that end by requiring Mercedes Benz dealers to make a written disclosure to their repair-customers whenever non-MBNA parts are being used. The latter solution is a far less restrictive alternative than the tie-in. The Fourth Circuit has already held in *Metrix* that disclosure and serial identification of MBNA parts would comprise an adequate and less restrictive alternative solution.

Disclosure also has the virtue of putting MBNA's evaluation of Mercedes Benz repair-customer expectation to a market test. If non-MBNA parts do in fact cause repair-customer dissatisfaction and thereby result in a loss of repair business and also impose additional transaction costs, then dealer incentive to use such parts would diminish and customer incentive to insist on MBNA parts would increase. There would, therefore, be no need for a tying agreement. In the event of a performance failure by the non-MBNA part there would be no adverse reflection on MBNA because a disclosure was made in advance as to the origin of the part.

III. Conclusion

For the reasons stated herein, *amicus curiae* Automotive Warehouse Distributors Association respectfully requests that this Court grant the petition of the Mozart Company for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

BASIL J. MEZINES*
DAVID U. FIERST
STEIN, MITCHELL & MEZINES
Suite 1060 N
1800 M Street, N.W.
Washington, D.C. 20036

* *Counsel of Record*

No. 87-2083

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE MOZART COMPANY, a corporation,
Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC., a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

MOSES LASKY*
LASKY, HAAS, COHLER &
MUNTER
Professional Corporation
505 Sansome Street, 12th Floor
San Francisco, CA 94111-3183
(415) 788-2700
Attorneys for Petitioner

*Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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PETITIONER'S REPLY BRIEF

When MBNA, respondent here, sought certiorari in the clone *Metrix* case, it saw it as a tying case and an important one.[1] The issues are all the more important now. The two cases and their conflict were the subject of the best attended panel discussion of the Antitrust Section at the American Bar Association Convention on August 8, 1988.

Yet respondent's brief in opposition now reclothes the case as an "exclusive dealing" one (e.g., its Question 1). An "exclusive dealing" contract provides that one must buy *all* its needs of a product from the vendor if it wishes to buy *any*. A tying arrangement provides that in order to buy Product A, one must also buy Product B from the same vendor. The present is a paradigm tying case; in order to buy Mercedes-Benz automobiles from MBNA, the dealer must also buy its replacement parts from it. *Standard Oil Co. v. United States*, 337 U.S. 293, 305-307 (1949) pointed out that, while exclusive dealing contracts may sometimes serve beneficial purposes, tying arrangements hardly ever serve any purpose beyond the suppression of competition. *Hyde* notes the distinction between the two (fn. 51).

Similarly, MBNA seeks to summon up learning about "ancillary restraints", even placing it in the forefront (e.g., its question No. 1). If ancillary learning applied to a tying agreement, there could *never* be a tying agreement illegal *per se* because what constitutes a tie is precisely the injection into an agreement to sell one product a requirement to buy another. Yet this Court held in *Hyde* that tying agreements can be illegal *per se*. Moreover, the function of "ancillarity" is merely to permit restraints otherwise illegal *per se* to be given rule of reason treatment (Bork, *Ancillary Restraints in the Sherman Act*, 15 A.B.A. Antitrust Law, §§ 211, 212 (1959); Restatement, Second, Contracts § 188 (1981)). Here the jury found unreasonableness under the Rule of Reason.

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[1] Its petition submitted (p. 2): "This case presents antitrust issues of substantial practical importance: the viability of the business justification defense and the applicability of the so-called 'less restrictive alternative' doctrine"; (at p. 20) "an important and recurring antitrust issue."

Respondent argues that the jury's two special verdicts that MBNA violated § 1 of the Sherman Act, both *per se* and under the Rule of Reason, did not mean "violation" because the trial court had told it that MBNA would be in violation only if the jury also found no justification (R. Br. 13, 14). But the verdicts were that the tying arrangement was *anti-competitive*; that is the stark fact MBNA will not confront. Its assertions (R. Br. 14) that " 'business justification' is simply another phrase for . . . rule of reason analysis", which weighs whether "legitimate commercial virtues" are "outweighed by other considerations", are false. As Justice Stevens stated in *National Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 688 (1978)

> "The Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."

It is of no consequence that one's purpose is economically desirable. *United States v. General Motors Corp.*, 384 U.S. 127, 142 (1966). The tying agreement here was anticompetitive in the most elementary way, because, in the words of *Associated General Contractors v. Carpenters*, 459 U.S. 519, 528 (1983), it "prevents its victims from making free choices between market alternatives" and is therefore "inherently destructive of competitive conditions."

The major characteristic of respondent's opposition is that it tries to defend the judgment on grounds not countenanced by either court below, instead of justifying what they did decide. For example, respondent argues that tying arrangements are unlawful only if they impact directly on the ultimate consumer, but not when they impact upon dealers who buy and consume in the course of serving the ultimate user (see R. Br. 23, 24), and that the automobile owners who sought repairs could have gone elsewhere than Mercedes dealers (R. Br. 7). When a tie is imposed directly upon the citizen, it is evaluated from his perspective, *Hyde, supra* (imposed on patients seeking anesthesiological service). But when the tie is imposed upon a dealer, it is evaluated from its perspective, *Blanton v. Mobil Oil Corp.*, 721

F.2d 1207 (9th Cir. 1983); *Grappone, Inc. v. Subaru of New England, Inc.*, 534 F.Supp. 1282 (D.N.H. 1982). The basic purpose of anti-tying law is to protect the *competition* in the tied market. *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962). "Restraint in the market affects consumers and competitors in the market; as such, they are the parties that have standing to sue", *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1183 (5 Cir. 1988).

MBNA argues that sales of Mercedes cars in the United States are only a small portion of all automobiles sold (e.g., R. Br. 2) and that there are independent repair shops (R. Br. 7). But this relates to "relevant market". That issue was given to the jury, and its verdict disposed of it by finding that the relevant product was Mercedes cars and replacement parts for Mercedes cars and that the Mercedes dealers were the relevant geographic market.

In short, this *is a tying case*. We examine what little MBNA proffers with respect to the tying issues.

I. Clayton Act § 3 Allows No Defense Of "Business Justification"

"The starting point for interpreting a statute is the language of the statute itself", *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). Yet respondent never refers to the text of § 3 or explains how it can be interpreted to allow "justification". Beyond sliding from "tying" to "exclusive dealings" and holding up *GTE Sylvania Inc.*[2] as revolutionizing all antitrust law, MBNA's response is to say that many of the cases we cited "arose" under § 3, naming *International B. Mach. Corp. v. United States*, 298 U.S. 131 (1936) (hereafter "*IBM*"), *Standard Oil Co. v. United States, supra*, 337 U.S. 293 (1949), and two decisions of inferior tribunals, *Pick* and *Matter of General Motors*.

But *IBM* puts the *quietus* to MBNA's contention. There Justice Stone quoted Section 3 and *immediately* stated that its *"precise terms"* made the tie unlawful, adding (p. 137):

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[2] The issue in *Sylvania* was whether a location restraint, was to be judged by a *per se* or a Rule of Reason analysis, whereas in the present case the jury found *both*, so that the debate is irrelevant.

"We rest it [our decision] rather on the language of § 3 of the Clayton Act which expressly makes tying clauses unlawful."

Then, addressing an attempted justification, the Court said (p. 140):

"The Clayton Act names no exception to its prohibition of monopolistic tying clauses. Even if we are free to make an exception to its unambiguous command, [citation omitted], we can perceive no tenable basis for an exception. . . ."

The *Pick* case is dead law, as pointed out by the Fourth Circuit in *Metrix* (828 F.2d 1033 at 1039), so much so that, as the court below remarks, MBNA "never seriously relied on *Pick*" (Pet. A-11). In *Matter of General Motors*, a tie-in clause such as MBNA's was ordered discontinued. MBNA cites *Standard Oil* for its statement about "exclusive dealing", ignoring the sharp contrast there drawn with tying arrangements (see p. 1, *supra*). That case aids MBNA not at all relative to Clayton § 3 and, as we now see, also ends its case under Sherman § 1.

II. Sherman § 1 Allows No Justification Of A Tie Except, Possibly, One MBNA Concedes It Does Not Have

Standard Oil, supra, held that if there can ever be a justification of a Section 1 tie it can only be when specification is impossible. Both the court below and MBNA agree that MBNA can furnish specifications and in fact did so to those to whom it wished to supply them (see Pet. p. 13).

MBNA's effort is escape is twofold. First, it asks that the law be changed (R. Br. 18-20) and asserts that reliance on *Standard Oil* is an "effort to stop the clock and arrest the development of antitrust principles at 1949" (R. Br. 18). But the court below had no right to reset a clock this Court had set. Then MBNA quotes the belief of an economist, Dr. Stigler, that tying arrangements should not be denounced by law (R. Br. 15-17) and that ability to specify should not be the criterion. Dr. Stigler conceded that he did not purport to testify that MBNA's conduct was lawful; he was only stating his view of what the law would be if based purely

on economic theory as he saw it.[3] The testimony of MBNA's economist witnesses did not address the issue but sought to supplant the law by their views of economic values.

The fundamental thesis of Dr. Stigler's "Chicago School" is that the "free market" should be the organ to protect competition. Yet, here, as respects tying arrangements, it is opined that the free market will not lead the dealers to buy first-rate replacement parts! Other economists, like the Monopolies and Mergers Commission of the United Kingdom, have taken the contrary position (see Pet. pp. 15, 16), as did the *Metrix* court (see Pet., pp. 16, 17). When Congress enacted the Sherman Act in 1890, it did not delegate to shifting economic theory or to contending economic schools the power to determine what antitrust law prohibits.[4] If the law is now to opt for a new slant in economic theory, only this Court can do so.

As a last resort MBNA argues that petitioner's counsel prepared the instructions on justification (e.g., R. Br. 13, 25, 26) but does not deny that Mozart had already presented its objections about justification, first by motion for summary judgment, then by requests for an instruction directing a verdict, then by request for further instructions after the evidence was in, and then by motion for directed verdict before anything was given the jury. A litigant whose basic contentions have been rejected by the trial court is

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[3] Said Dr. Stigler, "I'm not a lawyer" (Tr. 27-11); the "economists live in the world of economics and not in the world of law" (Tr. 27-83). He disagreed with the pronouncement frequently made by this Court that tying arrangements serve hardly any purpose other than the suppression of competition (Tr. 27-85).

[4] See L. Sullivan, *Antitrust* (West, 1977), p. 11:

> "In enacting the antitrust laws Congress had in view other desiderata in addition to the one to which economics grants recognition. The courts have an obligation to attend all of these goals, not just the one which economists also sanction. Thinking and writing about the law as though rational resource allocation were the only goal can only lead to confusion.

Accord, Learned Hand, J., in *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2 Cir. 1945), the trail-breaking *Alcoa* case.

entitled to instructions on a fall-back position without being deemed to have waived its basic position.

Less Restrictive Alternative

Respondent asserts that some parts supplied by independents were inferior to parts from MBNA, although made by the same original equipment manufacturers (R. Br. 8, 9). The evidence does *not* support these statements, but for present purposes we may assume them to be true. They are irrelevant. MBNA could have required its dealers to inform customers whether parts were obtained from MBNA, a requirement not questioned by Mozart (see Pet. p. 16, fn. 12). The consumer could then make his choice, the market would operate, and MBNA's goodwill would not be injured if the part proved inferior. Any contrary conclusion must rest on a contention that an occasional dealer would be guilty of fraud on the customers. The law cannot engage in that kind of assumption. Yet that is precisely where MBNA's economists (quoted R. Br. 17) came to rest: prevention of the hypothetical occasional fraud of a "free rider" justifies the manufacturer's imposing a restriction which, by happy coincidence, enlarges its pocketbook! But judgments like these are not the stuff of fact finding for divers juries to reach divers results. These are matters of legal standards. The opinion below notes that the courts have been skeptical of the quality control defense, but argues that it should be viewed "with less skepticism than it usually has been accorded" (Pet. A-13). The courts have been more than skeptical; until the decision below no quality control defense has ever been accepted. As Justice Stone wrote in *IBM*, 298 U.S. at 139, 140:

> "The very existence of such restrictions suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price."

III. "Business Justification" Is Not A Defense To A Claim Of Attempt To Monopolize

MBNA makes no effort to respond to the reasoning of the petition on this subject. It simply asserts, erroneously, that the defense of "business justification" is recognized in attempt-to-monopolize cases, citing as support *Aspen Skiing Co. v. Aspen*

Highlands Skiing Corp., 472 U.S. 585, 608-612 (1985) and three decisions of courts of appeals.

Aspen, does not so hold. Affirming a judgment against defendant for a Sherman § 2 violation, the Court merely held that a finding of absence of "any normal business purpose" supported the inference of "specific intent". This is 180° from a holding that, where the elements of an attempt to monopolize are present, violation can be justified. A particular legitimate business reason might be evidence in support of a finding of lack of specific intent but does not compel it. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 814, 815 (9 Cir. 1976). As said in *United States v. Columbia Steel Co.*, 334 U.S. 495, 531-532 (1948), "even though the restraint effected may be reasonable under § 1, it may constitute an attempt to monopolize forbidden by § 2 if a specific intent to monopolize may be shown". What may justify under Section 1 is only an item of evidence under Section 2. Respondent does not try to answer our showing (Pet. 19, 20) that the special verdicts *established specific intent* or that the issue of whether there was specific intent should have gone to the jury.

Not one of MBNA's three citations of Court of Appeals' decisions holds what it claims. If they did, that would merely constitute a conflict with the Sixth and Eighth Circuits' decisions in *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8 Cir. 1982), and *United States v. Dairymen, Inc.*, 660 F.2d 192 (6 Cir. 1981) (see Pet. at 21). MBNA avoids even mentioning those cases.

In *Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225, 1231 (3 Cir. 1988), plaintiff failed because there was no evidence to support the "heart" of its claim (p. 1231) that defendant had overbooked films to prevent them from coming to plaintiff. The court held (p. 1231): "[T]he extent of Fox's overbooking is not great enough to support such an inference". In *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7 Cir. 1986), there was also lack of evidence to give the case to the jury, as succinctly summarized in an opinion denying rehearing (802 F.2d 217, 218). *Bell v. Dow Chemical Co., supra*, 847 F.2d 1179, 1185 (5 Cir. 1988), was a refusal to deal case. A refusal to deal is not an antitrust violation (under the *Colgate*

doctrine) except in the case of a monopolist whose purpose is to create or maintain a monopoly (pp. 1184, 1185). The fact of refusal for "legitimate business concerns (such as cost savings, shortage of supplies, more efficient production)", may support a finding of no intention to perpetuate a monopoly (p. 1185).

IV. The Decision Below Conflicts With Elementary Law Of Collateral Estoppel

Why the decision in the Maryland federal courts is not dispositive is an important issue.

Respondent takes as its premise that the kind of collateral estoppel here involved was "offensive" not "defensive" (its Question 2). But this is not a case of "offensive" application, because the issue to which it relates is "justification" of what otherwise would be an antitrust violation. Both courts below treated the burden of establishing "justification" as on MBNA, the party seeking to justify the tie (Pet. A-12, A-46). As to *that* issue, Mozart's position was not "offensive" but defensive, i.e., that MBNA was precluded from its *affirmative* contention by a prior adverse adjudication.

But apart from that, MBNA's argument makes no effort to justify refusal to apply collateral estoppel on the reasoning of either court below. It seeks to do so solely on arguments they rejected. When Mozart moved for a ruling of collateral estoppel, the trial court announced its intention to apply collateral estoppel, rejecting all of MBNA's arguments. When the trial court in *Metrix* later granted a new trial on the amount of damages, the trial court here changed its decision solely because of the view that the *Metrix* decision had ceased to be "final". When it was affirmed by the Fourth Circuit before the instant case was decided in the court below, we submitted and the court below *agreed* and held that "the fact that this decision [of the Fourth Circuit] is subsequent in time to the district court proceedings in the case before us does not bar any preclusive effect that the *Metrix* case might possess" (Pet. A-10). The sole basis of its decision against collateral estoppel is that the evidence was different. MBNA does not try to defend that reasoning, which is so contrary to elemen-

tary law that it alone should warrant, not only grant of a writ, but summary reversal as well.[5]

Still advancing reasons to which the courts below gave no countenance, MBNA argues (R. Br. 20) that the jury instruction on business justification was different from that given in *Metrix*. But MBNA told the Fourth Circuit that the instruction there given was that MBNA could *not* justify at all unless it could not give specifications and that, as MBNA could not satisfy that criterion, the instruction amounted to a *directed verdict* against MBNA. That was precisely the basis of Mozart's motion for directed verdict. MBNA being collaterally estopped on this issue, Mozart's request for a directed verdict should have been granted.

V. Respondent's Discussion Confirms That The Decision Below Rests On Views That Obsolete Tying Law

Respondent dismisses the fact that the decision expressly contradicts *Digidyne* with the comment that the large Ninth Circuit should be left to care for its own conflicts (R. Br. 27 *et seq.*). But something far more important is involved, as respondent's discussion demonstrates.

It says (at p. 21) that after the damages trial takes place in *Metrix*, the case will return to the Fourth Circuit and if it adheres to the views it has already expressed, MBNA will use the repudiation by the court below of *Digidyne* in a petition for certiorari in *Metrix*. That is far more than intra-circuit conflict. The time to nip bad law is now.

MBNA's further discussion (at p. 28) is to the effect that Mercedes sells its automobiles to dealers for less than it can get away with and therefore is entitled to force the dealers to buy their replacement parts from it at higher prices than competitors as a "package sale" at a competitive price. This is a contention that tying law cannot apply because there are not two products but only one, *viz.*, "a package": an automobile, sold in one year,

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[5] Respondent argues that Mozart could have joined in the *Metrix* trial (R. Br. 25) and that in something called the IAP case a judgment went for it (R. Br. 10, 25). Both contentions are false, both were rejected by the trial court, MBNA presented neither to the Court of Appeals. In that court MBNA rested on the contention of lack of finality.

and replacement parts needed for repairs one, two or ten years later and manufactured later, are one product! In the summer 1988 issue of *Antitrust*, the publication of the A.B.A. Section on Antitrust Law (at pp. 40, 41), under the captions "Two Product Issue Continues to Confound Tying Analysis" and "Replacement Parts and Post- Purchase Service," the writer argues that *this is exactly the substance of what was decided below in the present case.*

This is nothing more than the Chicago School's reasoning, as exemplified in Bork, *The Antitrust Paradox*, Chapter 19, that a tie should never be held unlawful because it would never be accepted by a buyer unless the sum of what it pays for the two products is no greater than it would pay in the absence of a tie.

Respondent concludes (R. Br. 30) that what the court below has done, regardless of how it expressed itself, was to adopt a bundle of ideas about "ancillarity", "market power", "lack of consumer forcing, and the like"! This Court's decisions on tying law have not accepted those arguments, and to do so would spell the end of tying law. Yet these are the sorts of law the decision below is being cited as having pronounced. The argument underscores why this case calls for a review by this Court.

Dated: San Francisco, California; September 8, 1988

MOSES LASKY
Attorney for Petitioner